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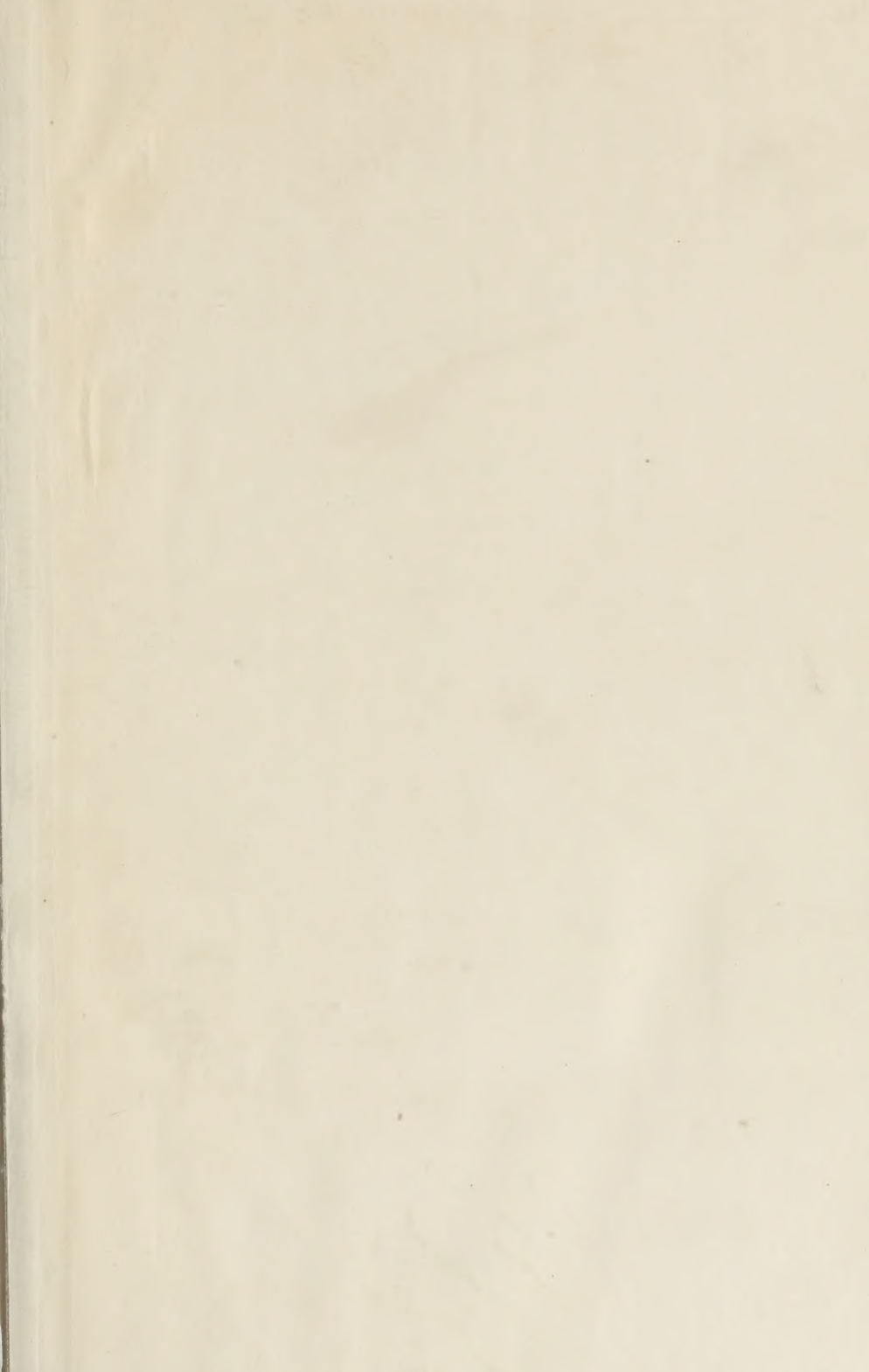
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1148
No. 3111

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES GYPSUM COMPANY, a Corporation,

Appellant,

VS.

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the
District of Montana.

FILED

FEB 2 - 1918

F. D. MONCKTON,
CLERK

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES GYPSUM COMPANY, a Corporation,

Appellant,

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Transcript of Record.

**Upon Appeal from the United States District Court for the
District of Montana.**

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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Names and Addresses of Solicitors of Record.

Messrs. NORRIS & HURD, of Great Falls, Montana,

Messrs. SCOTT, BANCROFT, MARTIN & STEPHENS, of Corn Exchange Bank Bldg., Chicago, Ill.

Solicitors for Defendant and Appellant.

Messrs. COOPER, STEPHENSON & HOOVER, of Great Falls, Montana,

Solicitors for Plaintiff and Appellee. [1*]

*In the District Court of the United States in and for
the District of Montana.*

No. 78—IN EQUITY.

THE MACKEY WALL PLASTER COMPANY,
Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY,
Defendant.

BE IT REMEMBERED that on December 23, 1916, plaintiff filed its Amended Bill of Complaint herein, in the words and figures following, to wit:

[2]

*Page-number appearing at foot of page of original certified Transcript of Record.

*In the District Court of the United States, District
of Montana.*

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Cor-
poration,

Defendant.

Amended Complaint.

Now comes the above-named plaintiff and for its
cause of action against the above-named defendant

COMPLAINS AND ALLEGES:

I.

That at all times herein mentioned plaintiff and
defendant were and now are corporations, the plain-
tiff duly organized and existing under and by virtue
of the laws of the State of Montana and a citizen of
said State with its principal place of business and
office at Great Falls, Montana; and the defendant
duly organized and existing under and by virtue of
the laws of the State of New Jersey and a citizen of
the said last-named state and authorized to do and
doing business in the State of Montana under and in
accordance with the provisions of the laws thereof,
but the principal place of business of defendant cor-
poration is to plaintiff unknown. [3]

II.

That heretofore, to wit, on the 15th day of June,

1909, by an instrument in writing dated June 15, 1909, the plaintiff, as party of the first part, and A. D. Mackey and Myra Post Mackey, as parties of the second part, made, executed, acknowledged and delivered to defendant herein a certain lease thereby leasing and letting unto defendant the real and personal property situated in the county of Cascade and State of Montana, particularly described as follows, to wit:

“All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said county, which are described as follows: The southeast quarter of the southwest quarter (SE. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section twenty-four (24); the East half of the Northwest quarter (E. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northeast quarter (NE. $\frac{1}{4}$) of Section twenty-five (25). Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (SW. $\frac{1}{4}$) of Section fourteen (14), Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument by deed bearing date the 16th day of October, 1908, which is of record in the office of the county clerk and recorder of said

Cascade County, in Book 53 of Deeds on page 332; together with all minerals in or under said lands, all rights, privileges, and easements incident or appurtenant thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore described, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights, privileges, easements and rights of way granted to said Plaster Company by J. Walter Rice, David Rice and Mary Rice, wife of said David Rice, in and over certain other land, in the vicinity of said tracts herein and hereby leased by their written instrument duly entered into with said Plaster Company on the 14th day of June, 1909.

“All of the right, title, interest and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said County of Cascade, which is described as follows: Beginning [4] at a point fifty (50) feet northwesterly from and at right angles to the center line of the B. M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the south line of Section two (2) Township twenty (20) North of Range three (3) East; thence Northeasterly parallel to the said center

line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company's line of railroad 220 feet; thence West at right angles 200 feet; to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet; thence Easterly in a straight line 175 feet, to the place of beginning, being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22d day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said indenture of lease is hereunto attached as part of this instrument and marked 'Exhibit Plant Lease.' "

"And the Plaster Company leases the real estate and mining property situated near said Village of Riceville with all of the rights and privileges incident or appurtenant to it as aforesaid, and subleases said real estate situated in or near said city of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid; together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any land adjacent thereto, and also all buildings and other improvements upon said leased land in or near the city of Great Falls including the manufacturing

plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements, and other property of every kind which is owned by said Plaster Company and is customarily used, or is useful in the operation of said mine and mining property near Riceville, or the conducting and managing of said manufacturing plant in or near the City of Great Falls.”

for a period of one year from and after July 5, 1908. And by and in said instrument granted unto the defendant the right to renew said lease for a further period of five years after July 5, 1910.

And the said plaintiff, by and in said instrument dated June 15, 1909, granted to defendant the irrevocable right and option to purchase of plaintiff, at any time before the expiration of said one year term, or if said [5] one year term should be renewed or extended for said five year term then at or before the expiration of said five year term, all the property and property rights described in said lease, for the sum of Fifty Thousand Dollars, payable as follows: Fifteen Thousand Dollars in cash at the same time with the execution and delivery of the conveyance of said property and property rights by the plaintiff; and the balance of Thirty-five Thousand Dollars in seven promissory notes of said defendant to be executed and delivered by said defendant to the said plaintiff at the time of the making of said cash payment; each of said notes to bear date the day on which said cash payment should be made and to be for the principal sum of Five Thousand Dollars pay-

able to the order of said plaintiff, one payable in three months and the other respectively in six, nine, twelve, fifteen, eighteen and twenty-one months after the date thereof with interest thereon at the rate of five per cent per annum from the date thereof until paid.

And it was agreed that simultaneously with the making of said cash payment and the execution and delivery of said notes, as in said instrument provided, the plaintiff should sell to the defendant and convey to it all of the said property and property rights of said plaintiff by a good and sufficient warranty deed then to be executed and delivered by said plaintiff to defendant covenanting therein especially that previous to the time of the execution of said warranty deed the said plaintiff had not conveyed any estate or interest in said property or created therein any property rights in favor of any person other than the defendant, and that said property rights should be at the time [6] of the execution and delivery of said deed free from encumbrances done, made or suffered by or through the act of said plaintiff or any person claiming under it. And further covenanting that said defendant should enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever.

III.

And at the same time and in the same instrument the above-mentioned A. D. Mackey and Myra Post Mackey, as owners and holders of all of the capital stock of plaintiff, gave and granted to defendant irrevocably the right, privilege and option at any time

during said one year or during said five-year term, if defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the plaintiff for the sum of fifty thousand dollars, payable at the same time and in the same manner as hereinbefore set forth for payment of the purchase price for said property and property rights, save and except that in the event that defendant should elect to purchase said shares from said shareholders and not said property and property rights from said plaintiff, then and in that event the said cash payment should be made to the said shareholders A. D. Mackey and Myra Post Mackey at the time of the delivery of the certificates for such stock and the said notes should be delivered to and be payable to the order of said shareholders. And the said shareholders then and there agreed in said instrument that at the time of the making of said cash payment and the execution and delivery [7] of said notes as in said instrument provided, the said shareholders would deliver to said defendant the certificates of stock representing all of the issued shares of said plaintiff duly endorsed to said defendant, and effectual to transfer the same to the said defendant on the books of the said plaintiff.

IV.

That defendant took possession of the property so leased to it under and in accordance with the terms of said lease, and enjoyed the use thereof during the life thereof; which said lease and agreement plaintiff will produce and proceed in accordance with the

law and the rules of this Honorable Court in such case made and provided, all of which said provisions will more fully appear when and as said lease and agreement shall be produced and proven. And plaintiff, for further certainty as to the terms and conditions of said lease and agreement, prays leave to refer thereto.

V.

That thereafter, and on, to wit, July 1, 1910, plaintiff and said A. D. Mackey and Myra Post Mackey and defendant entered into a further agreement, dated July 1, 1910, in writing and whereby the said lease and agreement, hereinbefore referred to, dated June 15, 1909, was renewed and extended for a further period of five years from and after July 5, 1910; which last-named agreement confirmed all of the rights and privileges set forth and contained in said instrument, and in said agreement dated June 15, 1909. And the said last-named agreement was made a part and parcel by reference to the said agreement dated July 1, 1910; a [8] copy of which last-named agreement is hereto annexed, and made a part hereof and marked Exhibit "A" to which reference is hereby made.

VI.

That defendant continued to occupy and use the above-described premises and property under the terms and conditions of the instruments hereinbefore referred to until July 5, 1915, when defendant applied to plaintiff and requested a further extension of said several agreements, to which extension plaintiff gave its consent. And thereafter on July 6, 1915,

plaintiff and said A. D. Mackey and Myra Post Mackey and defendant, in order to make effective said agreement for said further extension, entered into an agreement in writing dated July 6, 1915, a copy of which is hereto annexed, made a part hereof, and marked Exhibit "B," to which for greater certainty as to its terms and conditions plaintiffs beg leave to refer.

VII.

And thereafter, at the request of defendant, plaintiff made a further modification of the last-named agreement dated July 14, 1915, a copy of which is hereto annexed, made a part hereof and marked Exhibit "C," to which plaintiff begs leave to refer.

VIII.

That as a part of the consideration for the making of said last-named agreement dated July 6, 1915, it was agreed that if defendant should determine that it would not avail itself of the option to purchase the property of the said plaintiff in the agreements of June 15, 1909, and July 1, 1910, contained, upon the terms and conditions of said agreements, [9] defendant would at least sixty (60) days prior to the 1st day of July, 1916, give the plaintiff herein a notice in writing to the effect that defendant would not purchase said property under and by virtue of said agreements. And it was further agreed that if defendant herein should neglect or fail to give such notice at least sixty days before July 1, 1916, it would thereby become obligated to make said purchase and pay the consideration in said instruments dated June 15, 1909, and July 1, 1910, provided to be paid in

the event of the purchase of said property, upon the terms and conditions and in like manner as is set forth in said several agreements.

IX.

That defendant did not give plaintiff or the said A. D. Mackey or Myra Post Mackey any notice in writing at least sixty days before the 1st day of July, 1916, or at any other time in accordance with the terms and provisions of said agreement dated July 6, 1915, or otherwise, that defendant did not intend to purchase said property under its said option. And thereby plaintiff avers defendant did elect to purchase said property above described and the whole thereof, and became obligated to pay for the same in manner and form as in said agreements provided.

X.

That after defendant had made its election to purchase the property of the said plaintiff described in said instruments dated June 15, 1909, and July 1, 1910, as aforesaid, in manner and form as aforesaid, plaintiff on the 5th day of July, 1916, made and acknowledged a good and sufficient [10] deed of general warranty and containing all of the specific warranties specified in said instruments dated June 15, 1909, and July 1, 1910, as aforesaid, and further covenanting that plaintiff would make any other or further conveyance that should or might be necessary or desirable on the part of the defendant and delivered and tendered said instrument to defendant.

XI.

Plaintiff further alleges that on July 5, 1916, the said A. D. Mackey and Myra Post Mackey as owners and holders of all of the issued capital stock of plaintiff made and acknowledged an instrument in writing sufficient to grant and convey to defendant all of their shares of stock in plaintiff, to wit, five hundred and fifteen shares and accompanying said instrument and annexed thereto were the certificates of stock representing all of the issued shares of said plaintiff and all said certificates were duly endorsed to the defendant so as to enable defendant to have the same transferred upon the books of said plaintiff. And plaintiff, at the same time, to wit, on July 6, 1916, being authorized so to do by said A. D. Mackey and Myra Post Mackey, tendered to defendant said instrument in writing assigning and conveying and confirming said shares of stock to defendant. And plaintiff then and there demanded of defendant that defendant pay to plaintiff the purchase price aforesaid of said property so as aforesaid elected by defendant to be purchased by it, to wit, fifty thousand dollars, fifteen thousand dollars thereof to be paid in cash and the remaining thirty-five thousand dollars to be paid by the notes of defendant [11] and demanded that defendant execute and deliver to plaintiff the said notes of defendant for the said remainder of said purchase price of said property and property rights payable at the times and in the manner provided in said agreement dated June 15, 1909, and July 1, 1910. And plaintiff avers that it offered to deduct from the cash payment

above mentioned any sum or sums which might then be due and owing to defendant by said A. D. Mackey and Myra Post Mackey.

XIII.

That defendant wholly refused to accept said deed or said shares of stock or said instrument in writing assigning said shares of stock to defendant, and wholly refused and still refuses to carry out and perform the terms and conditions of said agreements, dated June 15, 1909, and July 1, 1910, notwithstanding its election to purchase said property in manner and form as aforesaid. And said defendant is attempting and undertaking to repudiate its said election to purchase said property.

XIV.

Plaintiff further alleges that a large portion of the property which defendant has obligated itself to purchase in manner and form as aforesaid from plaintiff, consists of mining property, to wit, Gypsum contained in the mines in said several instruments described, and the extent of the gypsum deposits therein are unknown, by reason whereof it would be impossible to estimate with reasonable certainty the damages which plaintiff will suffer as a result of the defendant's refusal to carry out and perform its contract to purchase. And plaintiff has no plain, speedy or adequate remedy at law in the premises and no remedy [12] save by and through the interposition of this Honorable Court as a court of equity to compel defendant to specifically perform its said contract and make said purchase. And plaintiff avers that it is ready and willing and has

ever been ready and willing to make any other or further conveyances or instrument that shall or may be necessary to invest defendant with the full and absolute and unencumbered title to all of the property which defendant agreed to purchase as aforesaid. And plaintiff is ready and willing to do all and every act which equitably it ought to do *it* it has not already done all that equity would require of it in the premises.

WHEREFORE plaintiff prays that defendant be required to pay in cash to plaintiff the sum of fifteen thousand dollars.

That defendant make and deliver to plaintiff its seven promissory notes of five thousand dollars each, payable at the times and in the manner stipulated in said contract, with interest at five per cent per annum, and that said notes be dated July 6, 1916.

And plaintiff here brings and deposits in this court the deed so as aforesaid made, acknowledged and tendered to defendant and the instrument so as aforesaid tendered to defendant assigning to defendant all of the capital stock of the said plaintiff, and the certificates of stock representing said shares of stock of plaintiff.

And that defendant be required to accept and receive said instruments and to specifically perform its said contract; [13]

And that plaintiff have such other and further relief in the premises as shall be agreeable to equity

and good conscience, and as plaintiff shall be found entitled.

COOPER, STEPHENSON & HOOVER,
RANSOM COOPER,
W. H. HOOVER,

Attorneys for Plaintiff.

State of Montana,
County of Cascade,—ss.

Ransom Cooper, being first duly sworn, deposes and says that he is one of the attorneys for the plaintiff named in the foregoing amended complaint, and is well acquainted personally with the facts therein stated; that he has read said complaint and knows the contents thereof and that the same is true except as to the matters therein stated upon information and belief, and as to those he believes it to be true.

RANSOM COOPER.

Subscribed and sworn to before me this 21st day of December, A. D. 1916.

[N. S.]

W. H. HOOVER,

Notary Public for the State of Montana, Residing
at Great Falls, in said County.

My commission expires February 2, 1917. [14]

Exhibit "A" to Amended Complaint.

THIS AGREEMENT made this 1st day of July, A. D. 1910, by and between THE MACKEY WALL PLASTER COMPANY, a Montana corporation, party of the first part, hereinafter designated the Plaster Company, A. D. MACKEY and MYRA POST MACKEY of the City of Great Falls, County

of Cascade, and state of Montana, parties of the second part and the UNITED STATES GYPSUM COMPANY, a New Jersey corporation, party of the third part, and hereinafter designated the Gypsum Company, WITNESSETH, that

WHEREAS, the parties hereto did heretofore and on the 15th day of June, 1909, enter into a certain written agreement, under seal, under and by virtue of the terms of which said agreement the Plaster Company demised and leased to the Gypsum Company, for a term of one year from the 5th day of July, 1909, to the 5th day of July, 1910, all the right, title, interest and estate of the Plaster Company, in and to certain lands, hereinafter described, which said instrument was filed for record in the office of the county clerk and recorder in and for the county of Cascade and State of Montana on the 20th day of July, A. D. 1909, at three o'clock P. M. of said day, and was duly recorded in Book one of leases at page 267, and

WHEREAS it is provided in said agreement that the Gypsum Company shall have the right and privilege to extend and renew said lease for a term of five years from the date of the expiration of the term mentioned therein upon the same conditions, and with the same reserved yearly rental as therein provided, and the Gypsum Company has elected to accept an extension and a renewal of said lease, and the parties hereto have agreed to such extension and renewal together with certain modifications of the terms of said lease.

NOW, THEREFORE, in consideration of the mutual covenants and promises hereinafter contained, the parties have agreed as follows:

FIRST. The Plaster Company in consideration of the sum of FIFTEEN THOUSAND (\$15,000.00) DOLLARS to be paid by the Gypsum Company, as hereinafter provided, does hereby demise and lease to the Gypsum Company, for and during the term of five years, commencing on the 5th day of July, 1910, and ending on the 5th day of July 1915, the following described real estate and mining property situated in the county of Cascade and State of Montana, to wit:

A. All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville in said county, which are described as follows:

The Southeast quarter of the Southwest quarter (SE. $\frac{1}{4}$ SW. $\frac{1}{4}$) of Section twenty-four (24); the East half of the Northwest quarter (E. $\frac{1}{2}$ NW. $\frac{1}{4}$) and the Northeast quarter (NE. $\frac{1}{4}$) of Section twenty-five (25), Township seventeen (17) North of Range six (6) East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (SW. $\frac{1}{4}$) of Section fourteen (14), township seventeen (17) North of Range six (6) east of the Montana principal meridian, the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument

by deed bearing date the 16th day of October, 1908, which is of record in the office of the county clerk [15] and recorder of said Cascade County in Book 53 of Deeds on Page 332. TOGETHER with all minerals in or under said land, all rights privileges, and easements incident or appurtenant thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore described, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part, and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights privileges, easements, and rights of way, granted in said Plaster Company by J. Walter Rice, David Rice and Mary Rice, wife of said David Rice, in and over certain other land in the vicinity of said tracts herein and hereby leased, by their written instrument duly entered into with said Plaster Company on the 4th day of June, 1909.

b. All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said County of Cascade, which is described as follows:

Beginning at a point fifty (50) feet northwesterly from and at right angles to the center line of the B. & M. Smelter branch as measured from a point in the said center line Seven Hundred and ninety (790) feet northeasterly from its intersection with the south line of Section two (2) Township twenty

(20) North of Range three (3) East; thence north-easterly parallel to the said center line one hundred and ninety-five (195) feet; thence north along the east boundary line of the right of way of the Great Northern Railway Company's line of railroad two hundred and twenty (220) feet; thence West at right angles two hundred (200) feet to the west boundary line of the said right of way; thence southerly along said boundary line three hundred and seventy (370) feet thence easterly in a straight line one hundred and seventy-five (175) feet to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the indenture of lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth a true copy of which said Indenture of Lease is hereunto attached to said agreement of June 15, 1909, to which reference is hereby made and by reference thereto, is made a part of this instrument.

And the Plaster Company leases the said real estate and mining property situated near said village of Riceville, with all the rights and privileges incident or appurtenant to it, as aforesaid, and subleases said real estate situated in or near said City of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid, together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any

land adjacent thereto, and also all buildings and other improvements upon said leased land, in or near the city of Great Falls, including the manufacturing plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements and other property of every kind which is owned by the Plaster Company, and is customarily used, or is useful in the operation of said mine and mining property near Riceville, or the conducting and managing of said manufacturing plant, in or near the city of Great Falls. [16]

SECOND. The Gypsum Company does hereby accept said lease and agree to pay to the Plaster Company, the sum of FIFTEEN THOUSAND (\$15,000) DOLLARS, as rent for said demised premises, payable as follows: the sum of THREE THOUSAND (\$3,000) DOLLARS on the 5th day of July 1910, as rent, to the 5th day of July, 1911, and the further sum of THREE THOUSAND (\$3,000) DOLLARS on the 5th day of July of each and every year thereafter, during the term hereby created, the sum being annual rent, at the rate of THREE THOUSAND (\$3,000) DOLLARS per annum, payable annually in advance.

THIRD. This term is granted upon the same conditions, covenants, and agreements contained in said written agreement of June 15, 1909, demising and leasing to the Gypsum Company said above described premises, for a term of one year from the 5th day of July, 1909 to the 5th day of July 1910, and all of the conditions, obligations, and covenants, and agreements contained in said written agreement,

are hereby made a part of this instrument, by reference thereto, and with the same force and effect as if each and all of the conditions, covenants, and agreements contained in said written agreement were expressed in writing herein, except such as are inconsistent with the terms of this instrument.

It being understood that all of the rights and privileges granted and given to the Gypsum Company in and by said written agreement of June 15th, 1909, by the Plaster Company, and said Second Parties or any or either of them are hereby extended and renewed for a term of five years, and are given and granted to the Gypsum Company to be used, enjoyed and exercised during the term of this lease, as if the same were expressed in writing herein, except such as are inconsistent with the terms of this instrument.

FOURTH. The Gypsum Company shall have the right or privilege at its election to terminate the term herein granted at the expiration of any year of said term by giving to the Plaster Company thirty days written notice of the intention of the Gypsum Company to terminate said term, said notice to be given at any time within thirty days prior to the expiration of any year of said term,—that upon giving such notice, and at the expiration of the year during which said notice shall be given, in accordance with the terms hereof, the term herein granted shall and, all the obligations and agreements of the Gypsum Company hereunder shall cease.

IN EXECUTION WHEREOF, in duplicate, each of the corporate parties hereto has caused these presents to be signed in its behalf by its President, and its corporate seal to be hereunto affixed duly attested by the signature of its secretary, and the parties of the second part have hereunto set their hands and seals the day and year first above written.
THE MACKEY WALL PLASTER COMPANY.

By A. D. MACKEY,

President.

A. D. MACKEY. (Seal)

MYRA POST MACKEY. (Seal)

Attest: RANSOM COOPER,

Secretary.

UNITED STATES GYPSUM COMPANY.

By S. L. AVERY,

President.

Attest: [17]

State of Minnesota,

County of Hennepin,—ss.

On this 14th day of July, A. D. 1910, before me, Caroline Beede, a notary public in and for the county of Hennepin and State of Minnesota, personally appeared A. D. Mackey, known to me to be the president of The Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year

in this certificate first above written.

CAROLINE BEEDE,

Notary Public in and for the County of Hennepin
and State of Minnesota, Residing at Minneapolis.

My commission expires on the 25th day of Sept.
1915.

State of Minnesota,
County of Hennepin,—ss.

On this 14th day of July, A. D. 1910, before me, Caroline Beede, a notary public in and for the county of Hennepin, and State of Minnesota, personally appeared A. D. Mackey and Myra Post Mackey, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

CAROLINE BEEDE,

Notary Public in and for the County of Hennepin
and State of Minnesota, Residing at Minneapolis.

My commission expires on the 25th day of Sept.,
1915.

State of Illinois,
County of Cook,—ss.

On this 2d day of July, A. D. 1910, before me, Stanley S. Jenkins, a notary public in and for the county of Cook and State of Illinois, personally appeared S. L. Avery, known to me to be the president of the

United States Gypsum Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

STANLEY S. JENKINS,
Notary Public of the State of Illinois, in and for the
County of Cook.

My commission expires on the 20th day of March, 1911. [18]

Exhibit "B" to Amended Complaint.

THIS AGREEMENT made this 6th day of July, A. D. 1915, by and between MACKAY WALL PLASTER COMPANY, a corporation, party of first part, and A. D. MACKAY and MYRA POST MACKAY, parties of the second part, hereinafter called the Lessors, and the UNITED STATES GYPSUM COMPANY, a corporation organized under the laws of the State of New Jersey and authorized to do and doing business in the state of Montana under and by virtue of the laws thereof, party of the third part, hereinafter called the Lessee,

WITNESSETH:

WHEREAS, on the 15th day of June, A. D. 1909, the parties hereto made a certain agreement wherein and whereby the Lessors let and leased certain property therein described to the Lessee, and granted to the Lessee certain options and privileges in said instrument fully set forth; and

WHEREAS, thereafter by an instrument in writing dated the first day of July, 1910, the parties by an instrument in writing extended the said instrument dated June 15, 1909, together with all of the rights, privileges and immunities therein set forth until and including this date; and

WHEREAS, the Lessee has requested Lessors to grant a further extension of said lease and options contained in said agreements dated June 15, 1909, and July 1, 1910, and in order to induce said extension, has offered to pay the same rents provided in said instruments, to be paid to Lessors for the privileges therein contained, for and during the period of one year from and after the date hereof, and Lessors have consented to make said renewal;

NOW, THEREFORE, in consideration of the premises and of the rental aforesaid and of the further sum of ONE DOLLAR, to Lessors paid by Lessee, the receipt of which is hereby acknowledged, it is agreed that the said instruments dated June 15, 1909, and July 1, 1910, be in all things and respects extended, renewed and made valid and of full force and effect for the further period of one year from and after the date hereof. And as a further consideration for said extension, Lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the Lessor Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it will, at least sixty days prior to the first day of July, 1916, give the Lessors in writing a notice to the effect that Lessee

will not purchase the said property under and by virtue of said agreements; and it is agreed that if Lessee shall neglect or fail to give such notice at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, upon the terms and conditions and in like manner as is set forth in several agreements, save and except as to the time for the making of the first payment in said agreements provided; in all other ways and respects the said agreements shall be and remain in full force and virtue, the same to all intents and purposes as they would if herein set forth at large and confirmed word for word.

IN TESTIMONY WHEREOF, the corporate parties hereto have caused their corporate names to be hereunto signed by their respective executive officers, in that behalf duly authorized, and their corporate seals affixed, and the individual lessors have hereunto set their hands and seals the days and year first above written. [19]

THE MACKEY WALL PLASTER COMPANY.

By A. D. MACKEY,
President.

Attest: RANSOM COOPER,
Secretary.

MYRA POST MACKEY,
A. D. MACKEY,
UNITED STATES GYPSUM CO.

By S. L. AVERY,
Pres.

Attest:

State of Illinois,
County of Cook,—ss.

On this 14th day of July, A. D. 1915, before me, A. J. Casion, a notary public for the State of Illinois, personally appeared S. L. Avery, known to me to be the president of the United States Gypsum Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

A. J. CASION,
Notary Public for the State of Illinois, Residing at
Chicago, in said County.

My commission expires July 7th, 1918.

State of Minnesota,
County of Hennepin,—ss.

On the 12th day of July, A. D. 1915, before me, Carolin Beede, a notary public for the State of Minnesota, personally appeared A. D. Mackey and Myra Post Mackey, his wife, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] CAROLINE BEEDE,
Notary Public for the State of Minnesota, Residing
at Minneapolis, in said County.

My commission expires Sept. 25, 1915.

State of Montana,
County of Cascade,—ss.

On this 6th day of July, A. D. 1915, before me, W. H. Hoover, a notary public for the State of Montana, personally appeared A. D. Mackey, known to me to be the president of the Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] W. H. HOOVER,
Notary Public for the State of Montana, Residing
at Great Falls, in said County.

My commission expires Feb. *a*, 1917. [20]

Exhibit "C" to Amended Complaint.

July 14, 1915.

United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

Dear Sirs:

We consider the terms of the supplemental contract made by us with your company on July 6, 1915, as clear and unambiguous, but in order that there may be no question whatsoever as to the terms thereof, we are writing you our construction of the same.

The lease and option given to you by us, as contained in the agreements of June 15, 1909, and July

1, 1910, are in all things and respects extended and renewed and continued in full force for a term of one year from July 6, 1915.

The only change therein is that in case you fail to notify us of your election not to purchase on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties, chattels, leases, rights and interest described in paragraphs "Second" and "Third" of said last-mentioned contract, together with any and all other properties, chattels, leases, rights and interests mentioned in the contracts of June 15, 1909, and July 1, 1910, above mentioned. And upon such conveyance being made by us, then you are to pay us the consideration mentioned in said contracts at the times and in the manner therein stated, the first payment of fifteen thousand dollars (\$15,000) to be made upon the execution and delivery by us of the conveyances above mentioned.

The notice to be given under said contract of July 6, 1915, shall be sufficient, if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either of us at the city of Great Falls, County of Cascade, State of Montana.

Yours very truly.

Service of the within amended complaint is hereby admitted this 22d day of December, A. D. 1916.

NORRIS & HURD,

Attorneys for Defendant.

Filed Dec. 23, 1916. Geo. W. Sproule, Clerk. [21]

Thereafter, on January 20th, 1917, answer to amended complaint was duly filed herein, in the words and figures following, to wit: [22]

United States of America,
District of Montana,—ss.

*In the District Court of the United States, District of
Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Cor-
poration,

Defendant.

Answer of Defendant to Amended Complaint.

This defendant, now and at all times hereafter, saving to itself all manner of benefit and advantage of exception which can or may be had or taken to the errors, uncertainties and other imperfections in said amended complaint contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering says:

I.

The defendant admits the allegations contained in paragraph I of said amended complaint.

II.

This defendant denies that on the 15th day of

June, 1909, the plaintiff, The Mackey Wall Plaster Company, and A. D. Mackey and Myra Post Mackey, leased to this defendant the real and personal property situated in the county of Cascade and State of Montana, described in paragraph II of the amended complaint filed by plaintiff herein, but this defendant [23] admits that on or about June 15, 1909, a written instrument was executed, acknowledged and delivered, wherein the said Mackey Wall Plaster Company was named as party of the first part and the said A. D. Mackey and Myra Post Mackey were named as parties of the second part and the United States Gypsum Company was named as party of the third part, a copy of which said written instrument is hereto annexed marked Exhibit "A" and made a part hereof; and this defendant admits that under and by virtue of the terms and agreements contained in said written instrument the plaintiff leased to this defendant the real and personal property situated in the county of Cascade and State of Montana and described in said paragraph II of said amended complaint, which said real and personal property is more particularly described and set forth in said written instrument in paragraph "Second" thereof.

This defendant further answering says that in addition to the real and personal property described in paragraph II of said amended complaint the said plaintiff, The Mackey Wall Plaster Company, by said instrument in writing leased to this defendant:

The right to exercise, use and enjoy during the term thereby created all the rights and privileges which were reserved to A. D. Mackey and Myra

Post Mackey in the deed from them to Thor A. Weggeland, bearing date the 1st day of October, 1908, and of record in the office of the County Clerk and Recorder of Cascade County, in Book 53 of Records, at page 525, and which said rights, privileges and easements were subsequently conveyed by the said A. D. Mackey and Myra Post Mackey to the said Mackey Wall Plaster Company, with the right and privilege to the said United States Gypsum Company to extract gypsum and other minerals from the mining property at or near Riceville, and to use and consume the same in the manufacture of plaster or for any other uses or purposes, as fully and in all respects as might have been done by the said Plaster Company prior to the making of said lease of June 15, 1909, and as fully and in all respects as might have been done [24] by the said A. D. Mackey and Myra Post Mackey prior to the conveyance of said reserved rights, powers, privileges and estate by them to the said Plaster Company; including the right to make new openings in said mining premises and to prospect for and dig, open up and operate new mines therein or thereon;

it being provided in said instrument of June 15, 1909, that such gypsum and other minerals when so mined, extracted or removed from said last mentioned premises were to be and remain the property of the said United States Gypsum Company as fully in all respects without further or other consideration or payment therefor as it ever has been, or could have be-

come, owned by said Plaster Company or by the said A. D. Mackey and Myra Post Mackey, its predecessors in title to said last-mentioned property; which said last-mentioned property is more fully described in paragraph "Third" of said instrument of June 15, 1909.

This defendant further answering admits that the said premises and all of them so leased to it as aforesaid by the said Mackey Wall Plaster Company were leased for the period of one year from and after July 5, 1909, with the right or privilege of this defendant to renew said lease for a further period of five years after July 5, 1910, which said right or privilege to so renew the said lease is more fully set forth in paragraph "Fourth" of said instrument of June 15, 1909.

This defendant further answering admits that the plaintiff in and by said instrument of June 15, 1909, gave and granted to this defendant irrevocably the right and option to purchase of said Plaster Company at any time before the expiration of said one year term, or if said one year term were renewed or extended for said five year term, then at any time before the expiration of said five year term, all the property and rights described in said lease for the sum of Fifty Thousand Dollars (\$50,000.00), payable as [25] follows:

Fifteen Thousand Dollars (\$15,000.00) in cash at the same time with the execution and delivery of the conveyance of said property and property rights by said Plaster Company, and the balance of Thirty-five Thousand Dollars

(\$35,000.00) in seven (7) promissory notes of this defendant to be executed and delivered by this defendant to the said Plaster Company at the time of the making of said cash payment, each of said notes to bear date the day on which said cash payment should be made and to be for the principal sum of Five Thousand Dollars (\$5,000.00), payable to the order of said Plaster Company, one three (3) months, and the others, respectively, six (6), nine (9), twelve (12), fifteen (15), eighteen (18), and twenty-one (21) months, after the date thereof, with interest thereon at the rate of five per cent (5%) per annum from the date thereof until paid;

which said right and option so given by the said Mackey Wall Plaster Company to this defendant is more particularly set forth in paragraphs "Thirteenth," "Fourteenth," "Fifteenth" and "Sixteenth" of said instrument of June 15, 1909.

This defendant admits that it was provided in said instrument of June 15, 1909, that simultaneously with the making of said cash payment and the execution and delivery of said notes, as hereinabove set forth, the said Plaster Company would sell to this defendant and convey to it all the said property and property rights of the said Plaster Company by a good and sufficient warranty deed then to be executed and delivered by the said Plaster Company to this defendant covenanting therein especially that previous to the time of the execution of the said warranty deed the [26] said Plaster Company had not conveyed any estate or interest in said property

or created therein any property rights in favor of any person other than this defendant; that said property and property rights should be at the time of the execution and delivery of said deed free from encumbrance done, made or suffered by or through the act of the said Plaster Company, or any person claiming under it, and that this defendant would enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever.

III.

This defendant admits that at the same time and in the same instrument, A. D. Mackey and Myra Post Mackey, described in said instrument of June 15, 1909, as said Plaster Company shareholders, gave and granted to this defendant irrevocably the right, privilege and option at any time during said one year, or during said five-year term, if this defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the said Mackey Wall Plaster Company for the sum of Fifty Thousand Dollars (\$50,000.00), payable at the same time and in the same manner as in said instrument set forth, for the payment of the purchase price for said property and property rights, save and except that in the event this defendant should elect to purchase said shares from said shareholders and not said property and property rights from said Plaster Company, then and in that event the said cash payment should be made to the said shareholders at the time of the delivery of the certificates for such stock

[27] and the said notes should be delivered to, and be payable to, the said shareholders, and that the said shareholders would at the time of the making of said cash payment and the execution and delivery of said notes, deliver to this defendant the certificates of stock representing all the issued shares of said plaintiff, The Mackey Wall Plaster Company, in form effectual to transfer the same to this defendant on the books of the said Mackey Wall Plaster Company; but this defendant further answering says that it never at any time exercised the option to purchase said shares of the capital stock of the said Mackey Wall Plaster Company, nor have the said A. D. Mackey and Myra Post Mackey at any time claimed that this defendant had exercised said last mentioned option, and this defendant says that all the allegations contained in said paragraph III of said amended complaint are irrelevant and impertinent and improperly inserted in said amended complaint.

IV.

This defendant admits that it took possession of the property so leased to it as aforesaid, and enjoyed the use thereof during the term of said lease; and further answering says that it paid all the rents and did all the things required by it to be done in accordance with the terms thereof.

V.

This defendant admits that thereafter and on, to wit, July 1, 1910 it entered into a further agreement in writing, a copy of which is annexed to the said amended complaint and marked Exhibit "A"; and

further answering says that under and by virtue of the terms of the said last mentioned [28] agreement the said Mackey Wall Plaster Company leased to this defendant, for and during the term of five years commencing on the 5th day of July, 1910, and ending on the 5th day of July, 1915, all of the property, real and personal, described in said first mentioned agreement of June 15, 1909, for the sum of Fifteen Thousand Dollars (\$15,000.00), payable to the said Mackey Wall Plaster Company in the installments and at the times as in said instrument provided, upon the same conditions, covenants and agreements as contained in said agreement of June 15, 1909; that it was also provided in said agreement of July 1, 1910, that all the rights and privileges granted and given to this defendant in and by said agreement of June 15, 1909, by the said Plaster Company and the said A. D. Mackey and Myra Post Mackey, were extended and renewed for a term of five years and were given and granted to this defendant to be used, enjoyed and exercised during said last mentioned term of five years as if the same were expressed in writing in said agreement of July 1, 1910, except such as were inconsistent with the terms thereof; that it was also provided in said agreement of July 1, 1910, that this defendant should have the right or privilege at its election to terminate therein granted at the expiration of any year of said term by giving to the Plaster Company thirty (30) days' written notice of the intention of this defendant to terminate the same, said notice to be given at any time within thirty (30) days'

prior to the expiration of any year of said term, and that upon the giving of such notice and at the expiration of the year during which any such notice should be given, the term therein granted and all the obligations and agreements of this defendant therein [29] should cease; and this defendant for further certainty as to the terms and conditions of said agreement of July 1, 1910, prays leave to refer to said agreement when the same shall be produced; that this defendant continued to occupy said premises during the term in said last mentioned agreement provided, and paid to the said Mackey Wall Plaster Company all of the rents therein agreed to be paid by it, and performed all the terms and conditions of said agreement in accordance with the provisions thereof.

VI.

This defendant admits that thereafter and on July 6, 1915, it entered into a further agreement in writing with the said plaintiff, a copy of which is annexed to said amended complaint and marked Exhibit "B"; and further answering says that it was provided in and by said agreement of July 6, 1915, that the said instruments dated June 15, 1909, and July 1, 1910, were in all things and respects extended, renewed and made valid and of full force and effect for the further period of one (1) year from and after the date thereof; that it was also provided therein that as a further consideration for said extension this defendant agreed that if it should determine that it would not avail itself of the option in said several agreements contained to purchase the

property of the said Mackey Wall Plaster Company upon the terms and conditions as in said several instruments provided, it would at least sixty (60) days prior to the first day of July, 1916, give the lessors a notice in writing to the effect that it would not purchase the said property under and by virtue of said agreements; that it was further provided therein that if this defendant should neglect or fail to [30] give such notice at least sixty (60) days before the first day of July, 1916, it would thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, upon the terms and conditions and in like manner as set forth in said several agreements, save and except as to the time for making the first payment in said agreements provided, and that in all other ways and respects the said agreements should be and remain in full force and virtue, the same to all intents and purposes as they would if therein set forth at large and confirmed word for word; that this defendant for greater certainty as to the provisions of said last-mentioned agreements prays leave to refer to said agreement when the same shall be produced.

VII.

This defendant admits that at its request the said plaintiff thereafter and on July 14, 1915, executed and delivered to it a certain instrument or letter dated July 14, 1915, but denies that said instrument is a modification of the aforesaid agreement of July 6, 1915; and further answering says that it was provided in said last-mentioned instrument that the

lease and option given to this defendant, as contained in the said agreements of June 15, 1909, and July 1, 1910, were in all things and respects extended and renewed and continued in full force for a term of one (1) year from July 6, 1915; and it was further provided in said instrument of July 14, 1915, that the only change in said agreements of June 15, 1909, and July 1, 1910, was, that in case this defendant failed to notify the said plaintiff of its election not to purchase on or before sixty (60) days [31] prior to the first day of July, 1916, then this defendant should be held to have elected to exercise the option of purchase contained in said contracts, and the said plaintiffs would thereupon become obligated to convey to it in manner as set forth in said contract of June 15, 1909, all the properties, chattels, leases, rights and interests described in paragraph "second" and "third" of said agreement of June 15, 1909, together with any and all other properties, chattels, leases, rights and interests mentioned in said contracts of June 15, 1909, and July 1, 1910, and that upon such conveyances being made, then this defendant was to pay to the said plaintiff the consideration mentioned in said contracts at the time and in the manner therein stated, the first payment of Fifteen Thousand Dollars (\$15,000.00) to be made upon the execution and delivery of the conveyances above mentioned; that it was also provided in said instrument of July 14, 1915, that the notice to be given under said contract of July 6, 1915, would be sufficient is deposited in the United States mails, postage prepaid, and enclosed

in an envelope addressed to the said plaintiff, or A. D. Mackey or Myra Post Mackey, at the City of Great Falls, County of Cascade, State of Montana; that for greater certainty as to the provisions of said instrument of July 14, 1915, this defendant prays to refer thereto when the same shall be produced.

VIII.

This defendant admits that it was provided in the said agreement of July 6, 1915, that as a further consideration for said extension this defendant agreed that if it should determine that it would not avail itself of the option [32] in said several agreements contained to purchase the property of the said Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it would at least sixty (60) days prior to the first day of July, 1916, give the lessors a notice in writing to the effect that it would not purchase the said property under and by virtue of said agreements, and that it was also provided therein that if this defendant should neglect or fail to give such notice at least sixty (60) days before the first day of July, 1916, it would thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of the purchase of said properties upon the terms and conditions in like manner as is set forth in said several agreements.

IX.

This defendant denies that it did not give the said plaintiff, or the said A. D. Mackey or Myra Post

Mackey, any notice in writing at least sixty (60) days before the first day of July, 1916, that it did not intend to purchase said properties under said option, but, on the contrary, this defendant further answering says that on April 19, 1916, more than sixty (60) days prior to July 1, 1916, it caused a letter to be addressed and mailed to the said A. D. Mackey addressed to him at 1224 Chestnut Street, Minneapolis, Minnesota, wherein it was stated that on May 5th the option of this defendant to purchase the mill property at Great Falls would expire, and that this defendant was writing to the said Mackey in advance of that date to inform him that conditions in Montana were such that it would be necessary for this plaintiff to cancel its arrangement with the said [33] plaintiff, and the said A. D. Mackey and Myra Post Mackey, at the time of its expiration on July 5th, meaning thereby the said agreements of June 15, 1909, July 1, 1910, and July 6, 1915, respectively; that although said letter was addressed to the said A. D. Mackey at 1224 Chestnut Street, Minneapolis, Minnesota, and not to the City of Great Falls, County of Cascade, State of Montana, as stated in said instrument of July 14, 1915, the same was received by the said Mackey on or before the 22d day of April, 1916; that it was also stated in said letter of April 19, 1916, that if the said Mackey cared to talk the matter over this defendant would be glad to have him visit its office for that purpose, and that this defendant expected to give to the said Mackey formal notice on May 5th that it did not care to purchase the said properties; that the said

Mackey, in pursuance of the suggestion to call upon this defendant as contained in said letter of April 19, 1916, wrote to this defendant that he would call upon this defendant on Thursday, the 27th day of April, 1916.

This defendant further answering says that the said A. D. Mackey was, at the time said last-mentioned letters were written as aforesaid and subsequent thereto, the President and General Manager of the said plaintiff, The Mackey Wall Plaster Company, and that all the negotiations for said leases, options and agreements had between the said Mackey Wall Plaster Company and this defendant were had with the said A. D. Mackey representing the said Mackey Wall Plaster Company; that all the rents paid by this defendant under said agreements to the said Mackey Wall Plaster Company were paid by it to the said A. D. Mackey representing the said Mackey Wall Plaster Company; that said A. D. Mackey is the husband of said Myra Post Mackey; that the said A. D. [34] Mackey and the said Myra Post Mackey were the owners of all of the capital stock of the said Mackey Wall Plaster Company, and that from the time of the making of said agreement of June 15, 1909, until the termination of said agreement of July 6, 1915, the said Mackey Wall Plaster Company was engaged in no business other than the leasing of said properties to this defendant and the collection of the rents under said agreements; that all of the business so conducted and carried on by the said plaintiff, The Mackey Wall Plaster Company, from June 15, 1909, was done

and carried on by the said A. D. Mackey representing the said Mackey Wall Plaster Company, and that the said A. D. Mackey was the agent and representative of the said Mackey Wall Plaster Company at the time of the events hereinafter stated.

This defendant further answering says that pursuant to the communications had between it and the said A. D. Mackey as aforesaid, the said A. D. Mackey on or about the 29th day of April, 1916, called upon this defendant at its main office in Chicago, Illinois, where he conferred with one O. M. Knode, the manager of operations of this defendant and in charge of the business of this defendant heretofore had and then had with the said Mackey Wall Plaster Company, at which conference there was also present one J. H. Nold, Chief Engineer of Mines of this defendant and in charge of the development and exploration of gypsum deposits in the properties owned, leased or occupied by this defendant; that at said conference the said A. D. Mackey was told by the said Knode and Nold that this defendant had decided not to purchase the said properties described in said instruments of writing, and that because of the difficulty in obtaining a sufficient quantity of material from the mines upon said [35] properties it was doubtful that the said properties could be successfully and economically operated in competition with the mills and mining operations of a new gypsum company which had opened a deposit near Lewistown, Montana; that the said Mackey then and there accepted the

notice so given to him as aforesaid, that this defendant had decided not to purchase the said properties, and thereupon entered into negotiations with this defendant for a further lease upon said premises, subject to termination upon short notice; that thereafter and during the whole of said conference the said Mackey and the representatives of this defendant as aforesaid discussed only the terms and provisions of a proposed further renewal and extension of the aforesaid lease and agreement; that at said conference and pursuant to such negotiations this defendant by its duly authorized representatives as aforesaid proposed to the said Mackey that this defendant would lease the said properties of the Mackey Wall Plaster Company for an indefinite period subject to cancellation upon sixty (60) days notice, and that the said Mackey then and there discussed the terms and conditions of such proposition and stated that before coming to a final agreement he desired to visit said properties and make an examination thereof, after which he would negotiate further with this defendant; that the said Mackey thereupon stated to the representatives of this defendant that he would go to Great Falls for the purpose of examining the then condition of the properties at Great Falls and Riceville, and he thereupon requests this defendant's said agents to write him at Great Falls the proposition then made to him and also to give him a letter of introduction to the operating superintendent of this defendant at the Great Falls properties with instructions to permit [36] him to go through the mill and mine upon said

properties and examine the condition thereof.

This defendant further answering says that it relied upon the statements made by the said Mackey at said last-mentioned conference, and that in pursuance of the request of the said Mackey this defendant gave him a letter of introduction to its said superintendent at Great Falls and also wrote to said superintendent requesting him to permit the said Mackey to visit and examine the said properties, and that this defendant did also in pursuance of the request of the said Mackey and on the 11th day of May, 1916, write the said Mackey at Great Falls the proposition made to the said Mackey at said conference, to the effect that this defendant would enter into an extension of those certain contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively, for an indefinite term, or for the term of one (1) year, subject to cancellation upon sixty (60) days' written notice, rental to be paid monthly in advance, instead of yearly as theretofore; that it was also stated in said letter of May 11, 1916 that by the letter of April 19, 1916, this defendant had advised the said Mackey that it would not purchase said properties and that at the said conference it also advised him that it would not purchase the said properties, and it was also stated therein that although this defendant was unwilling to purchase said properties, it was willing to extend the said leases upon the conditions hereinabove stated; which said proposition to so extend the said lease was written to the said Mackey in pursuance of the said

conference had in Chicago on April 29, 1916, and at his special request.

This defendant further answering says that the said Mackey, following such conference as aforesaid, went to Great Falls, Montana, but did not inspect any of said properties [37] and sent no further communication to this defendant until May 12, 1916, when he sent to this defendant a letter written, as this defendant is informed and believes and so states the fact to be, by the attorney of the said plaintiff, wherein it was stated that since this defendant did not give notice in writing at least sixty (60) days before the first day of July, 1916, of an intention not to purchase, in accordance with the provisions of the said contract of July 6, 1915, it had therefore elected to purchase the property described in said several contracts of June 15, 1909, July 1, 1910, and July 6, 1915, and that it had occurred to the writers of such letters that possibly this defendant might wish to consummate the purchase by receiving the formal conveyances before the time stipulated in said contracts; that at the time said last-mentioned letter was so written as aforesaid the said Mackey and the said Mackey Wall Plaster Company knew that this defendant had not elected to purchase said properties, but, on the contrary, thereof this defendant had stated to the said Mackey that it would not purchase the said properties as aforesaid, and that it could not therefore have occurred to the said Mackey or to the Mackey Wall Plaster Company, or to Myra Post Mackey, that this defendant possibly might wish to consum-

mate said purchase and receive the conveyances before the time stipulated in said contracts, as stated in said letter; that prior to the time said letter was written the said Mackey had received the letter of this defendant of April 19, 1916, and if any further notice of the intention of this defendant was necessary under said contract the said Mackey at the said conference in Chicago on April 29, 1916, waived any such notice, and, as stated heretofore, entered into negotiations with this defendant for a [38] further lease upon said premises to become effective subsequent to the expiration of the said agreement of July 6, 1915, which said negotiations were wholly inconsistent with any agreement on the part of this defendant to purchase said properties, as stated by the said Mackey in said letter of May, 12, 1916; and this defendant avers that by reason of the aforesaid conduct of the said plaintiff it is forever barred from alleging or setting up that it received no notice in compliance with the terms of said contract, or that any notice received was in any respect inaccurate or insufficient.

X.

This defendant denies that it elected to purchase the property of the said Mackey Wall Plaster Company, as alleged in paragraph X of said amended complaint, but admits that on or about July 5, 1916, it received from the said Mackey Wall Plaster Company a warranty deed purporting to convey said properties to this defendant; that this defendant neither admits nor denies that said warranty deed was a good and sufficient deed of general warranty

and contained all of the specific warranties specified in said instruments of June 15, 1909, and July 1, 1910, but demands strict proof thereof; and this defendant for further certainty as to the contents of said deed prays leave to refer to the same when the same shall be produced by the said plaintiff; that at the time of the attempted delivery of said deed as aforesaid and from thence until the present time, the said Mackey Wall Plaster Company was not, and is not now, the owner in fee simple of all of the properties described in said contracts, and that the said Mackey Wall Plaster Company was then, and is now, unable to convey [39] a good title to said premises free and clear of all encumbrances whatsoever; and further answering this defendant says that the said Mackey Wall Plaster Company is itself unable to convey and transfer to this defendant the premises described in paragraph II of the plaintiff's amended bill of complaint.

XI.

This defendant denies all of the allegations contained in said paragraph XI of said amended complaint, and further answering says that each and all of said last-mentioned allegations are irrelevant and impertinent and improperly inserted in said amended complaint.

XIII.

This defendant admits that it refused to accept said deed and wholly refused and still refuses to carry out and perform the terms and conditions of said agreements of June 15, 1909, and July 1, 1910, relating to said option, but denies that it elected to pur-

chase said property in manner and form as aforesaid; and further answering this defendant denies that it is attempting and undertaking to repudiate any such election to purchase said properties, because it never at any time elected to make such purchase; that this defendant admits that it refused and still does refuse to accept said shares of stock, or said instrument in writing assigning said shares of stock to it, but further answering says that the allegations of said paragraph XIII of said amended complaint, that the defendant wholly refused to accept said shares of stock, or said instrument in writing assigning said shares of stock to defendant, and that said defendant is attempting and undertaking to repudiate its said election to purchase said property, are [40] irrelevant and impertinent and improperly inserted in said amended complaint.

XIV.

This defendant further answering says that it was provided in said agreement of June 15, 1909, that upon this defendant quitting and surrendering to the said Plaster Company the premises leased thereby, the said Plaster Company would at the election of this defendant repurchase from it all materials and supplies acquired by this defendant, pursuant to the terms of this agreement, at the price paid for the same by this defendant, and that the said Plaster Company would purchase from this defendant all other materials and supplies then on hand in said plaster plant at Great Falls at the reasonable value thereof, and would repay to this defendant any unearned premium or premiums on any and all poli-

cies of insurance upon said premises, and likewise the unearned portion, if any, of any rental paid by this defendant to the Railway Company mentioned in said lease, and that in the event that pursuant to the provisions of said agreement this defendant should have made any alterations or changes in the buildings or premises, or should have erected or constructed any fixtures therein or thereon with the approval of the said Plaster Company, then the said Plaster Company would pay to this defendant the then reasonable value thereof; that this defendant at the expiration of said extension of July 6, 1915, and on the 5th day of July, 1916, vacated all of said premises and delivered to the said plaintiff the keys to the buildings thereon and notified the said plaintiff that it had vacated the said premises; that this defendant also notified in writing [41] the said plaintiff that it was obligated to pay to it under the terms of said contract of June 15, 1909, the following sums of money:

The cost price of materials and supplies then in the possession of this defendant and acquired by it from the said plaintiff, amounting to Six Hundred Thirty-nine Dollars and Eleven Cents (\$639.11);

The reasonable value of all other materials and supplies on hand on July 6, 1916, amounting to Three Thousand Nine Hundred Thirty-four Dollars and Forty-one Cents (\$3,934.41);

The unearned premium on policies of insurance held by this defendant upon said premises,

amounting to Eighty Dollars and Thirty-five Cents (\$80.35);

The unearned portion of the rental paid by this defendant to the Great Northern Railway Company, amounting to One Hundred Nine Dollars and Forty-four Cents (\$109.44);

The reasonable value of all alterations or changes made by this defendant in the buildings or premises and of certain fixtures, as shown in the inventory delivered by this defendant to the said plaintiff, amounting to Two Thousand Four Hundred Twenty Dollars (\$2,420.00);

all of which said sums of money, aggregating the sum of Seven Thousand One Hundred Eighty-three Dollars and Thirty-one Cents (\$7,183.31), became due and payable to this defendant on the 6th day of July, 1916, upon the termination of said lease and in accordance with the terms and conditions thereof; that although this defendant has demanded the payment of said sums of money from the said plaintiff, the said plaintiff has wholly failed and refused to pay the same, or any part thereof, and that the same is now due and owing to this defendant with interest at the rate of six per cent (6%) per annum from said last-mentioned date. [42]

XV.

This defendant, in accordance with Rule 29 of The Rules of Practice for the Courts of Equity of the United States, further answering says:

(a) That all of the allegations of said amended complaint to the effect that at the same time and in the same instrument the said A. D. Mackey and Myra

Post Mackey, as holders and owners of all of the capital stock of plaintiff, The Mackey Wall Plaster Company, gave and granted to defendant irrevocably the right and option at any time during said one year, or during said five year term, if defendant should not have elected to purchase said property and property rights, to purchase of them and each of them all of the issued shares of the capital stock of the plaintiff, The Mackey Wall Plaster Company, for the sum of Fifty Thousand Dollars (\$50,000.00), payable at the same time and in the same manner as hereinbefore set forth for payment of the purchase price for said property and property rights, save and except that in the event that the defendant should elect to purchase said shares from said shareholders, and not said property and property rights from said Plaster Company, then in that event the said cash payment should be made to the said plaintiff's shareholders at the time of the delivery of the certificates for such stock, and the said notes should be delivered to and be payable to the order of said shareholders, and the said plaintiff's shareholders then and there agreed in said instrument that at the time of the making of said cash [43] payment and the execution and delivery of said notes, as in said instrument provided, the said shareholders would deliver to said Gypsum Company the certificates of stock representing all of the issued shares of said plaintiff, The Mackey Wall Plaster Company, duly endorsed to said Gypsum Company and effectual to transfer the same to the said Gypsum Company on the books of the said plaintiff,

The Mackey Wall Plaster Company, found in paragraph III of said amended complaint; that on July 5, 1916, A. D. Mackey and Myra Post Mackey made and acknowledged an instrument in writing wherein and whereby they granted and conveyed to defendant all of their shares of stock in the plaintiff, The Mackey Wall Plaster Company, and accompanying said instrument and annexed thereto were the certificates of stock representing all of the shares of said A. D. Mackey and Myra Post Mackey in the said plaintiff, The Mackey Wall Plaster Company, to wit, all of the shares of stock in the said plaintiff, The Mackey Wall Plaster Company, and said certificates were duly endorsed by A. D. Mackey and Myra Post Mackey, to the defendant so as to enable defendant to have the same transferred upon the books of the said plaintiff, The Mackey Wall Plaster Company, and plaintiff at the same time, to wit, on July 6, 1916, that it tendered to defendant said instrument in writing assigning, conveying and confirming said shares of stock to defendant and demanded of defendant that defendant pay to plaintiff the purchase price aforesaid of said property, to wit: [44] Fifty Thousand Dollars (\$50,000.00), Fifteen Thousand Dollars (\$15,000.00) thereof to be paid in cash and the remaining Thirty-five Thousand Dollars (\$35,000.00) to be paid by notes of this defendant, and demanded that defendant execute and deliver to plaintiff the notes of defendant for the said remainder of said price of said property and property rights payable at the time and in the manner provided in said agreements dated June 15,

1909, and July 1, 1910, and plaintiff avers that it offered to deduct from the cash payment due from defendant as aforesaid all that was due for principal and interest upon the said note of said A. D. Mackey and Myra Post Mackey, as aforesaid, found in paragraph XI of the said amended complaint; that the defendant wholly refused to accept said shares of stock, or said instrument in writing assigning said shares of stock to defendant, and that said defendant is attempting and undertaking to repudiate its said election to purchase said property, found in paragraph XIII of said amended complaint; and so much of the prayer of said amended complaint wherein the plaintiff alleges that it brings and deposits in this court the instrument so as aforesaid tendered to defendant assigning to defendant all of the capital stock of the said plaintiff, The Mackey Wall Plaster Company, and the certificates of stock representing said shares of stock of plaintiff, The Mackey Wall Plaster Company, and praying that the defendant be required to accept and receive said instruments; are each and all, and every part thereof, irrelevant and impertinent, in [45] that they are allegations not material to the issues made or tendered by said amended complaint, and should be expunged therefrom.

(b) That the plaintiffs in said amended complaint have failed to allege that the United States Gypsum Company, the defendant therein named, determined not to purchase said properties described in said contracts sixty (60) days prior to July 1, 1916, and failed to give to the said plaintiff notice, in accord-

ance with said contracts, of its determination not to purchase.

(c) That the said amended complaint does not state any matter of equity entitling plaintiff to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against this defendant.

WHEREFORE, the defendant moves that said amended complaint, or such parts thereof as may be irrelevant and impertinent, be dismissed.

Having thus made full answer to all the matters and things contained in the said amended complaint, this defendant prays that it have judgment for the said several sums of money mentioned in paragraph XIV hereof, aggregating Seven Thousand One Hundred Eighty-three Dollars and Thirty-one Cents (\$7,183.31), together with interest thereon, and that said amended complaint be dismissed, and that this defendant recover its costs in this behalf incurred.

UNITED STATES GYPSUM COMPANY,

By SCOTT, BANCROFT, MARTIN &
STEPHENS.

NORRIS & HURD,

Its Solicitors. [46]

Exhibit "A" to Answer to Amended Complaint.

THIS INDENTURE, made this 15th day of June, in the year Nineteen Hundred and Nine, by and between THE MACKEY WALL PLASTER COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of Montana, party of the first part, A. D. MACKEY and

MYRA POST MACKEY, of the City of Great Falls, County of Cascade and State of Montana, parties of the second part, and the UNITED STATES GYPSUM COMPANY, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey, party of the third part, WITNESSETH, that,

WHEREAS, the said party of the first part hereto (which is hereinafter referred to as the Plaster Company), acting by and through the said A. D. Mackey, its President, has offered to lease to the party of the third part hereto (which is hereinafter referred to as the Gypsum Company), the mining property and manufacturing plant now owned by said Plaster Company which are hereinafter more particularly described, together with all rights, privileges, and easements appurtenant thereto or used in connection therewith; and, as an inducement to the acceptance of such lease by said Gypsum Company, upon the terms heretofore agreed upon and hereinafter set forth, the said Plaster Company, acting by and through the said A. D. Mackey and Myra Post Mackey, the holders and owners of more than three-fourths of all the issued shares of its capital stock, has offered and agreed to sell to said Gypsum Company the right, privilege and option of purchasing from said Plaster Company the property and property rights hereby leased, at the price and upon the terms and conditions heretofore agreed upon and hereinafter set forth, and, as an inducement to the acceptance by said Gypsum Company of said lease and said option, from said Plaster Company, the said

A. D. Mackey and Myra Post Mackey, the parties of the second part hereto (who are hereinafter referred to as Plaster [47] Company, shareholders) have offered and agreed to sell unto said Gypsum Company the right, privilege, and option of purchasing from them, and each of them, all of the issued shares of the capital stock of said Plaster Company, at the time, for the price and upon the terms and conditions herein stated; and

WHEREAS, the said Gypsum Company, acting by and through S. L. AVERY, its President, has accepted said several offers hereinbefore recited on the part of said Plaster Company and its shareholders, upon the terms and subject to the conditions hereinafter set forth; and

WHEREAS, for the purpose of specifically defining and declaring the respective rights, duties, privileges, and obligations of each of said parties hereto, under the contracts heretofore entered into between them, the said parties have agreed to the due execution and delivery of this instrument in duplicate, on behalf of each of them; and

WHEREAS, prior to the execution and delivery of this instrument on behalf of either of the corporate parties thereto, the granting of said option, and the making of said lease by said Plaster Company, as herein set forth, were duly authorized, adopted, sanctioned, and approved, by its stockholders at a meeting lawfully called and at which all of the issued shares of its capital stock were represented by the attendance of the shareholders in person or by proxy, and also by the resolution of its Board of Directors,

lawfully adopted during a duly called meeting of such Board; and

WHEREAS, the due execution, acknowledgment and delivery of this instrument, in duplicate, on behalf of each of said corporate parties, by the executive officers thereof and the attaching thereto of the corporate seal of each of them, by such officers, was duly and expressly authorized and directed by the Board of Directors of each of them at a meeting duly called and held; [48]

NOW, THEREFORE, IN CONSIDERATION of the mutual and dependent covenants hereinafter contained, and the fulfillment thereof by each of the parties hereto respectively, and in further consideration of the sum of ONE DOLLAR (\$1.00), each to the other this day in hand paid, the receipt and sufficiency whereof are hereby acknowledged, the said parties of the first, second and third parts hereto do hereby undertake, covenant, stipulate and agree to and with each other as follows:

FIRST. It is hereby specially understood and agreed, by and between all the parties hereto, that all of the stipulations, covenants and conditions herein contained, constitute covenants running with the land herein described and shall be binding upon the parties hereto and the heirs, personal representatives, successors and assigns of the respective parties hereto, and shall likewise be for, and inure to the benefit of, the heirs, personal representatives, successors and assigns of each of the respective parties hereto.

SECOND. The said Plaster Company does

hereby demise and lease to the said Gypsum Company, for the full term of one year from the fifth day of July, 1909, the following described real estate and mining property situated in said County of Cascade and State of Montana, to wit:

a. All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said County, which are described as follows: The Southeast quarter of the Southwest quarter (S.E. $\frac{1}{4}$ S.W. $\frac{1}{4}$) of Section Twenty-four (24); the East Half of the Northwest quarter (E. $\frac{1}{2}$ N.W. $\frac{1}{4}$) and the Northeast quarter (N.E. $\frac{1}{4}$) of Section twenty-five (25), Township seventeen (17), North of Range six (6), East of the Montana Principal Meridian; and all the right, title, interest and estate of said Plaster Company in and to the Southwest quarter (S.W. $\frac{1}{4}$) of Section Fourteen (14), Township Seventeen (17) North of Range Six (6) East of the Montana Principal Meridian; the same being all of the rights in and title to said several tracts of land which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part to this instrument by deed bearing date the 16th day of October, 1908, which is of record in the office of the County Clerk and Recorder [49] of said Cascade County in Book 53 of Deeds on Page 332; TOGETHER with all minerals in or under said land, all rights, privileges and easements incident or appurtenant

thereto, and especially all rights acquired by said Plaster Company in or concerning the use of land adjacent to said tracts of land hereinbefore described, under and by virtue of the written instrument duly entered into by and between Villa Clara Albright and William H. Albright, her husband, as parties of the first part and the said Plaster Company as party of the second part thereto, on the 15th day of June, 1909, as well as all rights, privileges, easements, and rights of way, granted to said Plaster Company by J. Walter Rice, David Rice, and Mary Rice, wife of said David Rice, in and over certain other land in the vicinity of said tracts herein and hereby leased, by their written instrument duly entered into with said Plaster Company on the 4th day of June, 1909.

b. All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: Beginning at a point fifty (50) feet Northwesterly from and at right angles to the center line of the B. & M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the South line of Section Two (2), Township Twenty (20) North of Range Three (3), East; thence Northeasterly parallel to the said center line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company's line of

railroad 220 feet; thence West at right angles 200 feet to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet; thence Easterly in a straight line 175 feet, to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked "Exhibit Plant Lease."

And the said Plaster Company leases the said real estate and mining property situated near said village of Riceville, with all of the rights and privileges incident or appurtenant to it as aforesaid, and subleases said real estate situated in or near said City of Great Falls, subject to the terms and conditions of the original lease to it as aforesaid; together with all buildings and other improvements upon said mining property near Riceville, and all buildings owned by said Plaster Company upon any land adjacent thereto and also all buildings and other improvements upon said leased land in or near the City of Great [50] Falls, including the manufacturing plant and storehouse structures thereon, and also all apparatus, machinery, tools, office furniture, fixtures, implements and other property of

every kind which is owned by said Plaster Company and is customarily used, or is useful in the operation of the said mine and mining property near Riceville, or in the conducting and managing of said Manufacturing Plant in or near the City of Great Falls, at and for the yearly rental of three thousand dollars (\$3,000.00), payable in advance at the time when this instrument has been duly executed and delivered on behalf of said lessor and possession of the demised property delivered to said lessee.

THIRD. The said Plaster Company, as lessor, in consideration of the payment of said rental, hereby grants to said Gypsum Company, as lessee, the right to exercise, use and enjoy during the term hereby created, all the rights and privileges which were reserved to the parties of the second part hereto in the deed from them to Thor A. Weggeland bearing date the 1st day of October, 1908, and of record in the office of the said County Clerk and Recorder of said Cascade County, in Book 53 of Deeds at page 325, and which said rights, privileges, and easements were subsequently conveyed by said parties of the second part hereto said Plaster Company, as hereinbefore recited. And said Gypsum Company, for the consideration as aforesaid, is hereby especially granted, as lessee hereunder, the right to extract gypsum and other minerals from said mining property at or near Riceville, and to use and consume the same in the manufacture of plaster, or for any other uses or purposes, as fully in all respects as might have been done by said Plaster Company prior to the making of this lease, and as fully and in all

respects as might have been done by said parties of the second part hereto prior to the conveyance of said reserved rights, powers, privileges, and estate by them to said Plaster [51] Company; including the right to make new openings in said mining premises and to prospect for and dig, open up, and operate new mines therein or thereon; such gypsum and other minerals, when so mined, extracted or removed, to be and remain the property or other consideration or payment therefor, as it ever has been, or could have become, owned by said Plaster Company, or by the parties of the second part, its predecessors in title to said property.

FOURTH. For the consideration hereinbefore recited, the said Plaster Company hereby grants to said Gypsum Company the right and privilege to extend and renew this lease for a term of five (5) years from the date of the expiration of the term of one year hereby created, such new term to be upon the same conditions and the same reserved yearly rental, payable annually in advance, as are herein and hereby provided as to said first term; and said Plaster Company specially undertakes and agrees to duly execute and deliver to said Gypsum Company a new written lease for said period of five years of all of the property and property rights herein described whenever, at any time during said term of one year, so requested in writing by, or on behalf of, said Gypsum Company, such new indenture of lease to contain all of the covenants, conditions, and agreements which are found in this written instrument, as part of said first lease; But, if, for any

reason or cause, such new written instrument should not be executed and delivered, when requested by said Gypsum Company, any written notice by said Gypsum Company to said Plaster Company of the election of said Gypsum Company to extend the term thereby created, by creating said second term, shall, if given at any time during said one year term, have the full force and effect of such new instrument and shall operate thereupon to extend this indenture, create said second term, and [52] make applicable thereto all the covenants and agreements herein contained.

FIFTH. It is further covenanted and agreed that, during the continuance of said one year term and of any extension or renewal thereof, the said Gypsum Company may make any reasonable changes or alterations in the buildings and premises hereby leased and may construct and erect any fixtures therein or thereon which in its opinion shall be suitable, proper, or convenient in the extraction or removal of gypsum or other minerals in, on or under said mining premises at Riceville, or in conducting said Manufacturing plant at Great Falls, or in the storage or shipment of any of the products of said mines or plant.

SIXTH. And said Gypsum Company does further covenant and agree to pay to said Great Northern Railway Company, for and on behalf of said Plaster Company, the rental which shall become due from said Plaster Company to said Railway Company under and by virtue of said indenture of lease between said Plaster Company and said Railway

Company until the expiration or sooner determination of the term hereby created and of any extension or renewal thereof.

SEVENTH. Said Gypsum Company does covenant and agree that, during the continuance of said one year term and of any extension or renewal thereof, it will keep all buildings which are now erected on said mining premises or on said premises at Great Falls on which said plaster plant is located, insured against risks of loss by fire to the extent of a total insurance of \$18,000.00, the policy or policies of insurance therefor to be taken in the name of and for the benefit of said Plaster Company. It is further understood and agreed that, if at the time said Gypsum Company shall take possession of said premises pursuant to the terms of this agreement, said Plaster [53] Company shall have any outstanding insurance on said buildings, the Gypsum Company shall, at the election of said Plaster Company then to be made, pay to said Plaster Company the amount of any unearned annual premium on said insurance to the extent of \$18,000.00 insurance, said payment to be made within thirty (30) days after possession shall have been taken as aforesaid; and insurance, the unearned annual premium on which the said Plaster Company shall elect that said Gypsum Company shall pay, shall be considered insurance provided by said Gypsum Company at the time of such election in fulfillment of its covenant in that behalf herein contained; it being understood that if said Gypsum Company shall make any additions to said buildings or erect any new

buildings upon said premises, such additions or new buildings shall be insured, if at all, by said Gypsum Company for its own benefit and at its own expense and not covered by or included in said insurance of \$18,000.00.

EIGHTH. It is further understood and agreed that if said buildings now on said premises, or any of them, shall, during the continuance of said term, or of any renewal or extension thereof, be destroyed or damaged by fire or other causes covered by any insurance in the name of said Plaster Company, the said Plaster Company shall immediately rebuild the same and repair the said damage to the extent of the amount of insurance due or to become due by reason of such destruction or damage. And if by reason of such destruction or damage, said buildings or any of them shall be rendered unsuitable or untenable for the purposes for which they are hereby leased, the said Gypsum Company may, at any time within thirty days after such destruction or loss shall have occurred, elect to terminate the term then subsisting, and thereupon the term then subsisting shall cease and determine. And if said Gypsum Company shall not exercise its said privilege of election, and said buildings or any of them [54] shall continue unsuitable or untenable for the purposes for which they are hereby leased, for the period of more than thirty (30) days after such loss or destruction shall have occurred, then the said Gypsum Company shall be entitled to a refund of the unearned portion of the said annual rent paid pursuant to this agreement for the period extending

from the date of such loss or destruction until said Plaster Company shall have rebuilt or repaired said building, and likewise to a similar allowance and refund (to be made by said Plaster Company) of rent paid, as hereinbefore provided, by said Gypsum Company to the Great Northern Railway Company as lessor of said Plaster Plant, which said last mentioned allowance and refund shall be estimated in the same manner as said refund of said rent paid to said Plaster Company.

NINTH. It is further understood and agreed that, on taking possession of the premises hereby leased, the said Gypsum Company shall buy of said Plaster Company, at the invoice price thereof, all materials and supplies of said Plaster Company in or about said premises at Great Falls of a character in their then condition immediately suitable for their ordinary use in operating said Plaster Plant in its own name and if the invoice prices do not include freight charges, then freight charges shall be added thereto; said purchase price to be paid by said Gypsum Company within thirty days after an inventory of said supplies and materials shall have thereafter been made. This agreement to purchase shall not be construed to include materials or supplies forming part of said mining premises or plaster plant as an existing mine or working plant.

TENTH. It is further understood and agreed that said Gypsum Company, after taking possession of said premises, shall pay off and discharge all undischarged liability of said Plaster Company to pay to its customers, according to the custom of the

[55] trade, a rebate of ten (10) cents a bag for all plaster bags then or thereafter to be returned by said customers to said Plaster Plant at Great Falls, the amount to be paid by said Gypsum Company in rebates as aforesaid not to exceed in all the sum of \$1,666.60. All bags on which said Gypsum Company shall have paid rebates as aforesaid shall be the property of said Gypsum Company without further or other consideration or payment therefor. All other bags belonging to said Plaster Company and in or about said Plaster Plant, or returned pursuant to said custom of trade, over and above those on which said Gypsum Company shall have paid rebates, are hereby declared to be part of the supplies hereinbefore agreed to be purchased by said Gypsum Company at the invoice price estimated as aforesaid. Said Gypsum Company shall also assume and hereby does assume the liability of said Plaster Company to the Kansas City Bag Company arising by reason of said Plaster Company having heretofore ordered of said Kansas City Bag Company, on or about the 28th day of December, 1908, 100,000 burlap plaster bags, to be shipped on or before July 1st, 1909; the bags represented by said order, if shipped, to be considered the property of said Gypsum Company purchased from said Plaster Company by virtue of the assumption of said liability. Immediately upon taking possession of said premises, said Gypsum Company shall brand with the brand of said Gypsum Company all sacks then on hand and purchased from said Plaster Company as herein provided. And all outstanding sacks of said Plaster

Company which shall be returned for rebates pursuant to said custom of trade shall likewise be similarly branded when returned.

ELEVENTH. And subject to the conditions and stipulations hereinbefore contained, said Gypsum Company does covenant and agree that, on the expiration or sooner determination of the term hereby created, or any extension or renewal thereof, [56] it will quit and surrender the premises to said Plaster Company in as good order and condition as said lessee received the same, reasonable wear and tear and damage by fire and the elements excepted.

TWELFTH. Said Plaster Company does covenant and agree that, on said Gypsum Company's quitting and surrendering to said Plaster Company the premises hereby leased at the expiration or sooner determination of the term hereby created or by any renewal or extension thereof, said Plaster Company shall, at the election of said Gypsum Company, then to be made, repurchase from said Gypsum Company all materials and supplies acquired by said Gypsum Company pursuant to the terms of this agreement at the price paid for the same by said Gypsum Company pursuant to the terms of this agreement, and to purchase of said Gypsum Company all other materials and supplies then on hand in said Plaster Plant at Great Falls at the reasonable value thereof; and to repay to said Gypsum Company any unearned premium or premiums on any and all policies of insurance procured by said Gypsum Company in the name of said Plaster Company, pursuant to the provisions of this agreement;

and likewise the unearned portion, if any, of any rental paid by said Gypsum Company to said Railway Company and the unearned portion, if any, of the rental paid by said Gypsum Company to said Plaster Company for the year, of either of said terms, then current; and, in the event that, pursuant to the provisions of this agreement, the said Gypsum Company shall have made any alterations or changes in the buildings or premises hereby leased or shall have erected or constructed any fixtures therein or thereon, and the same shall have been made, constructed, or erected with the approval of said Plaster Company, the said Plaster Company shall pay to said Gypsum Company the then reasonable value thereof to said Gypsum Company; in case [57] any such improvements shall have been made, or any such fixtures shall have been constructed or erected by said Gypsum Company without having first obtained the approval of said Plaster Company to the making, construction, or erection of the same, the said Gypsum Company shall have the right to remove the same, provided such removal can be made without irreparable injury to the freehold and provided further that damage done in effecting such removal shall be repaired by said Gypsum Company at its own expense; said payment to be made by said Plaster Company, and said removal to be made by said Gypsum Company, within thirty days after the expiration or sooner determination of said term or of any renewal or extension thereof. Within the operation of the foregoing provision, said Plaster Company hereby in advance, irrevocably consents to

and approves of the removal by said Gypsum Company of all buildings owned by said Plaster Company situated on lands of said William R. Albright and said Villa Clara Albright, or either of them, adjacent to said mining premises at Riceville, and labor performed and money expended in removing said buildings shall be considered labor performed and money expended in the making of improvements with the approval of said Plaster Company within the meaning of the covenant in that regard hereinbefore contained.

THIRTEENTH. And said Plaster Company, for the considerations hereinbefore recited, does hereby give and grant to said Gypsum Company, irrevocably, the right and option to purchase of said Plaster Company, at any time before the expiration of said one year term, or, if said one year term shall be renewed or extended for said five year term, then at any time before the expiration of said five year term, all the property and property rights herein described, for the sum of Fifty Thousand Dollars (\$50,000.00) payable as follows: Fifteen Thousand Dollars (\$15,000.00) in cash at the same time with the [58] execution and delivery of the conveyance of said property and property rights by said Plaster Company, and the valance of \$35,000.00 in seven promissory notes of said Gypsum Company, to be executed and delivered by said Gypsum Company to said Plaster Company at the time of the making of said cash payment, each of said notes to bear date the day on which said cash payment shall be made and to be for the principal sum of \$5,000.00,

payable to the order of said Plaster Company, one three months, and the other respectively, six, nine, twelve, fifteen, and eighteen, and twenty-one months after the date thereof with interest thereon at the rate of 5% per annum from the date thereof until paid. And simultaneously with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said Plaster Company will sell to said Gypsum Company and convey to it all the said property and property rights of said Plaster Company by a good and sufficient warranty deed, then to be executed and delivered by said Plaster Company to said Gypsum Company, covenanting therein especially that previous to the time of the execution of the said warranty deed, the said Plaster Company has not conveyed any estate or interest in said property or created therein any property rights in favor of any person other than said Gypsum Company, that said property and property rights are, at the time of the execution and delivery of said deed, free from incumbrances done, made or suffered by or through the act of said Plaster Company or any person claiming under it; and that said Gypsum Company shall enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever. And said Plaster Company shareholders, for the consideration aforesaid, do give and grant to said Gypsum Company irrevocably the right, privilege and option, at any time during said one year or during said five year term, [59] if said Gypsum Company shall not have elected to purchase said property and prop-

erty rights, to purchase of them and of each of them all the issued shares of the capital stock of said Plaster Company for the sum of Fifty Thousand Dollars (\$50,000.00), payable at the same time and in the same manner as hereinbefore provided for the payment of the purchase price for said property and property rights, except that, in the event that said Gypsum Company shall elect to purchase said shares from said shareholders and not said property and property rights from said Plaster Company, then and in that event the said cash payment shall be made to said shareholders at the time of the delivery of the certificates for such stock and the said notes shall be delivered to and be payable to the order of said shareholders. And at the same time with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said shareholders will deliver to said Gypsum Company the certificates of stock representing all of the issued shares of said Plaster Company duly indorsed to said Gypsum Company and effectual to transfer the same to said Gypsum Company on the books of said Company issuing the same.

FOURTEENTH. Notice of election by said Gypsum Company to exercise its right and option to purchase from the Plaster Company the property and property rights herein referred to will be fully and effectually given, and said election shall be deemed fully and effectually exercised, for all purposes by the delivery of a written notice thereof to the President, Vice-president, or Secretary of said Plaster Company, or by depositing in the United

States postoffice in any city or town in the United States such written notice in a securely sealed envelope with the postage thereon prepaid addressed to said Plaster Company at Great Falls, Montana, or to the person who shall then hold any one of the official positions [60] in said company hereinbefore mentioned at his last known residence or place of business. And upon the giving of such notice in the manner aforesaid, the right of said Gypsum Company to the conveyance to it of said property and property rights, as hereinbefore provided, shall immediately vest, and the right of said Plaster Company to the purchase price therefor in the manner hereinbefore provided, shall immediately mature, and all other rights and obligations of the respective parties hereto shall thereupon determine and the said Gypsum Company shall thereby become the full and absolute owner of all of said property and property rights and said Plaster Company shall thereafter have no rights in or concerning said property but shall have only the right to the payment of the purchase price therefor at the time and in the amounts and by the methods hereinbefore provided. Notice of election to purchase said shares of stock may be given in the manner hereinbefore provided as to notice of election to purchase said property and property rights, excepting only that the written notice must be delivered in person to either of the parties of the second part hereto, or mailed to either of them in the manner hereinbefore provided for notice by mail to the Plaster Company, or, in the event of the death of either or both of said parties of the

second part hereto, or the transfer otherwise than by death of any part or all of said shares of stock or any interest therein, by delivery of said written notice to the successor or successors in interest of said parties of the second part or either of them, or by the giving to such successor or successors notice by mail in the same way as is hereinbefore provided.

FIFTEENTH. It is further especially understood and agreed, by and between the parties hereto, that, if the said Gypsum Company shall elect to purchase the property and property [61] rights of the Plaster Company after such property has been partially damaged or wholly destroyed by fire or other causes covered by any insurance in the name of said Plaster Company, then, and in that event, the said Gypsum Company shall immediately upon giving notice of election to buy as hereinbefore provided, succeed to all the rights of the said Plaster Company in any fire or other policy or policies covering said loss, including the right, to demand, collect, receive, adjust and give full receipts for all moneys which any Insurance Company may or should pay under such policy or policies and also the right to the benefit resulting from the rebuilding or repairing of the damaged structures, if the insurance company shall so elect. But if said Gypsum Company shall elect to purchase said property at the time and under the circumstances in this paragraph hereof recited, and shall thereupon, pursuant to the rights herein and hereby granted, collect from any insurance company any portion or all of such insurance money, or otherwise accept benefits from said insurance, as the purchaser

of said premises, it shall thereupon reimburse said Plaster Company for any sum or sums which it may have expended in repairing the loss or damage to said premises by fire prior to receiving said notice of election or prior to the payment of any funds by any such insurance companies.

SIXTEENTH. If, at any of the times herein authorized, the said Gypsum Company shall in the manner herein provided, elect to purchase the said property and property rights of said Plaster Company, and shall give due notice thereof as herein required, then and in that event, such portion of the rental theretofore paid by said Gypsum Company to said Plaster Company for the year of either of said terms then current, which shall be unearned at the time of the making of such election and the giving of such notice, shall be refunded to said Gypsum Company [62] by said Plaster Company, or, if said Gypsum Company shall so elect, may be by it deducted from the cash payment of \$15,000, required to be paid by it as part of the purchase price of said property and property rights.

SEVENTEENTH. Whenever, under the provisions of this instrument, the said Gypsum Company shall have the right to exercise any privilege herein created and the manner of such election is not therein provided for, whether or not such right or privileges be to renew said leasehold term of one year hereby created, to terminate either of said terms, to require said Plaster Company to purchase buildings and improvements and supplies at the termination of said terms by expiration or otherwise, such election may,

in any of such events, be fully and effectually exercised by said Gypsum Company by the delivery of written notice or the mailing of such notice in the manner hereinbefore provided for the giving of other notices.

EIGHTEENTH. It is further understood and agreed that, during the term of one year hereby created and of any extension or renewal thereof, the said Plaster Company as lessor of said premises herein described will pay all taxes and assessments now or hereafter to be laid upon said demised property and property rights and every part thereof whenever the same shall become due and payable; and, if at any time during either of said terms, said lessor shall fail to pay any portion of said taxes or assessments when due and payable, in that event said Gypsum Company is hereby authorized to pay the same for and on behalf of said lessor and thereafter to demand and collect the same from said lessor by any lawful method or to deduct the same from any rental or other indebtedness then or thereafter to become due by said Gypsum Company to said Plaster Company, including the cash portion of the purchase price for said property, and property rights if any such payment or repayment [63] of taxes is due to said Gypsum Company by said Plaster Company at the time of the election to purchase said property and property rights as herein provided.

IN EXECUTION WHEREOF, in duplicate, each of the corporate parties hereto has caused these presents to be signed in its behalf by its president and its corporate seal to be hereunto affixed duly at-

tested by the signature of its Secretary, and the parties of the second part have hereunto set their hands and seals the day and year first above written.

THE MACKEY WALL PLASTER COMPANY.

By A. D. MACKEY,
President.

A. D. MACKEY. (Seal)

MYRA POST MACKEY. (Seal)

UNITED STATES GYPSUM COMPANY.

By S. L. AVERY,
President.

(Seal) Attest: RANSOM COOPER,
Secretary.

(Seal) Attest: S. T. MESERVEY,
Secretary. [64]

INDENTURE, made this 22d day of June, 1908, between the GREAT NORTHERN RAILWAY COMPANY, hereinafter called the "Lessor," party of the first part, and THE MACKEY WALL PLASTER COMPANY, hereinafter called the "Lessee," party of the second part, WITNESSETH:

The Lessor, in consideration of the payments and covenants herein stipulated to be made, kept and performed by the Lessee, does hereby demise, lease and let unto the said Lessee the following described real estate, situate in the City of Great Falls, County of Cascade, State of Montana, to wit:

Beginning at a point 50 feet northwesterly from and at right angles to the center line of the B. and M. Smelter Branch as measured from a

point in the said center line 790 feet north-easterly from its intersection with the south line of Section 2, Township 20 North, Range 3 East.

THENCE northeasterly parallel to the said center line 195 feet, thence north along the east boundary line of the right of way of said first party's railway, 220 feet, thence west at right angles 200 feet, to the west boundary line of the right of way, thence southerly along said boundary line 370 feet, thence easterly in a straight line 175 feet, to the place of beginning, as shown colored red and marked "A" on the plat hereto attached, which plat is hereby made a part of this agreement.

TO HAVE AND TO HOLD the above-demised premises unto the said Lessee, its successors and assigns, for and during the full term of ten (10) years from and after the first day of July, 1908.

The Lessee covenants to and with the Lessor to pay as rent for the above-demised premises the sum of Two Hundred and Twenty-five Dollars (\$225.00) per annum, payable in advance on the first day of January in each year during said term.

The Lessee also shall and will pay all taxes, assessments and water rates, general and special, that may be levied or assessed or become due and payable upon said demised premises, and the buildings and improvements placed thereon by the Lessee during the term hereby demised, as and when the same become due [65] and payable and before the same become delinquent.

The Lessor covenants that during the term hereby

demised it will furnish and maintain adjacent to said premises suitable trackage not to exceed One Thousand Seven Hundred and Thirty feet (1,730) in length from its connection with the present trackage of the said Lessor's railroad, for the purpose of handling carload shipments to and from said premises, all grading for said trackage to be done by and at the sole cost and expense of the Lessee.

The Lessee covenants to and with the Lessor that it will on or before the first day of September, 1908, erect and complete, and during said term maintain in full and complete operation upon said premises a warehouse and mill for the manufacture, storing and handling of plaster, and that it will use and occupy said premises exclusively and solely for the purpose hereinabove mentioned.

It is further understood and agreed by and between the parties hereto that in case the Lessee shall for a consecutive period of thirty (30) days cease to maintain and operate said warehouse and mill and do business thereat, then this indenture and the term hereby demised shall immediately become cancelled and determined without any further act or notice.

It is agreed between the parties hereto that no railroad or other transportation company other than the Lessor and no person or persons engaged in transportation shall have the right or be allowed to use any track or tracks upon or extending to said premises without the express permission in writing of the Lessor.

The Lessee covenants to and with the Lessor that it will deliver or cause to be delivered to said Lessor

for transportation over the lines of railroad of said Lessor, all competitive shipments made by or to the said Lessee from or to [66] said premises, provided the rates and charges of said Lessor for such transportation shall be as reasonable and low as the rates and charges of other and competitive lines of railroad.

The Lessee shall and does hereby assume all risk and liability for any and all loss and damage to said warehouse and mill, their fixtures, appliances and appurtenances, and to the contents of said mill and warehouse and to all property stored or located in or upon said premises in any manner caused by fires set by locomotive engines of the Lessor, or otherwise, or by the neglect, carelessness or misconduct of any person or persons in the employ of the Lessor; and the Lessee hereby releases and discharges the Lessor from any and all liability on account of loss of or damage to said warehouse and mill, their fixtures, appliances and appurtenances, caused in any manner aforesaid, and shall and will indemnify and save harmless the said Lessor from any loss or damage on account of the destruction of or damage to said warehouse and mill and other property caused in the manner aforesaid.

The Lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the Lessor, its successors or assigns thereto.

In case the Lessee, its successors, or assigns, shall

fail to remove the buildings, structures and other property, placed upon said premises by it, within sixty (60) days after the termination of the term hereby demised, or any renewal or extension thereof, by lapse of time or otherwise, then all right, title and interest of the Lessee, its successors or assigns, in and to said buildings, structures and other property shall cease and the title to the same shall pass to and become vested in the Lessor. [67]

In case the Lessee shall fail to make the payments hereinabove provided for, or shall fail to keep and perform each and every of the covenants and conditions in this indenture stipulated to be by the Lessee kept and performed, then the Lessor may upon thirty (30) days' notice in writing cancel and determine this indenture and the term hereby demised and enter upon said premises and take possession thereof and exclude all persons therefrom.

It is further understood and agreed between the parties hereto, that the Lessee may, by giving to the Lessor at least thirty (30) days before this lease expires, a notice in writing of its desire to do so, continue in possession of said premises from year to year subject to all the terms and conditions herein contained, said continuance, however, to be at any time subject to termination upon thirty (30) days' notice in writing from either party to this agreement; subject to the following:

That the rental for said extended term shall be six per cent (6%) of the then value of said demised premises and the trackage constructed for the purpose of serving same; provided, however, that if said

valuation shall be such as to fix said rental at a less amount than that provided for the original term of this indenture, the rental for said additional term shall be Two Hundred and Twenty-five Dollars (\$225.00) per annum. If the parties hereto fail to agree upon said valuation, same shall be fixed by appraisers, each party hereto to name one appraiser, and the two so chosen shall select a third and the award of any two thereof shall be conclusive and binding on each of the parties hereto. [68]

IN WITNESS WHEREOF, the parties hereto have caused this indenture to be duly executed the day and year first above written.

In presence of:

GREAT NORTHERN RAILWAY COM-
PANY.

By _____,
THE MACKEY WALL PLASTER
COMPANY.

By _____. [69]

State of Montana,
County of Cascade,—ss.

On this 15th day of June, A. D. 1909, before me, Geo. Raban, a notary public for the State of Montana, personally appeared A. D. Mackey, known to me to be the president of the Mackey Wall Plaster Company, one of the corporations that executed the within instrument, and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year

in this certificate first above written.

[Seal]

GEO. RABAN,

Notary Public for the State of Montana, Residing at
Great Falls, Montana.

My commission expires on the 24th day of Dec.,
1909. [70]

State of Montana,

County of Cascade,—ss.

On this 15th day of June, A. D. 1909, before me,
Geo. Raban, a notary public for the State of Mon-
tana, personally appeared A. D. Mackey and Myra
Post Mackey, his wife, known to me to be the persons
whose names are subscribed to the within instru-
ment, and acknowledged to me that they executed the
same.

IN WITNESS WHEREOF, I have hereunto set
my hand and affixed my official seal the day and year
in this certificate first above written.

[Seal]

GEO. RABAN,

Notary Public for the State of Montana, Residing at
Great Falls, Montana.

My commission expires on the 24th day of Dec.,
1909. [71]

State of Illinois,

County of Cook,—ss.

On this 30th day of June, A. D. 1909, before me,
Stanley S. Jenkins, a notary public in and for the
county of Cook, State of Illinois, personally ap-
peared S. L. Avery, known to me to be the president
of the United States Gypsum Company, one of the
corporations that executed the within instrument,

and acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

[Seal] STANLEY S. JENKINS,
Notary Public of the State of Illinois, in and for the
County of Cook.

My commission expires on the 20th day of March,
1911. [72]

State of Illinois,
Cook County,—ss.

I, Joseph F. Haas, county clerk of the county of Cook, DO HEREBY CERTIFY that I am the lawful custodian of the official records of notaries public of said county, and as such officer am duly authorized to issue certificates of magistracy, that Stanley S. Jenkins whose name is subscribed to the proof of acknowledgment of the annexed instrument in writing, was, at the time of taking such proof of acknowledgment, a notary public in and for Cook County, duly commissioned, sworn and acting as such and authorized to take acknowledgments and proofs of deeds or conveyances of lands, tenements or hereditaments, in said State of Illinois, and to administer oaths; all of which appears from the records and files in my office; that I am well acquainted with the handwriting of said notary and verily believe that the signature to the said proof of acknowledgment is genuine; and further, that the annexed instrument is executed and acknowledged according to the laws of the State of Illinois.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the county of Cook at my office in the City of Chicago, in the said County, this 24 day of June, 1909.

JOSEPH F. HAAS,
County Clerk.

Endorsed on cover of instrument:

Office of County Clerk and Recorder,
County of Cascade, Montana.

I hereby certify that the within deed was filed for record in this office on the 20th day of July, A. D. 1909, at 3:00 o'clock P. M. and was duly recorded in book 1 of Leases, page 267.

DAVID M. WOOD,
County Clerk and Recorder.

Service of the foregoing Answer by receipt of a copy thereof is hereby acknowledged on this, the 19th day of January, 1917.

COOPER, STEPHENSON & HOOVER,
Attys. for Plaintiff.

Filed Jan. 20, 1917. Geo. W. Sproule, Clerk.
[73]

Thereafter, on January 27th, 1917, reply to answer was duly filed herein, in the words and figures following, to wit: [74]

*In the District Court of the United States District
of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Reply.

Now comes the above-named plaintiff, and for its reply to the answer of the defendant herein

ALLEGES:

I.

It DENIES each and every allegation, matter and thing in paragraph XIV of defendant's answer contained, and especially denies that plaintiff, in manner and form, as alleged by defendant, or otherwise, became or is indebted to defendant in any sum or amount whatever.

II.

Further replying to defendant's said answer plaintiff DENIES each and every allegation, matter and thing in defendant's answer contained not herein or in plaintiff's amended complaint alleged, admitted, qualified or denied.

WHEREFORE [75] plaintiff prays for the relief prayed for in its said amended complaint.

RANSOM COOPER,
COOPER, STEPHENSON & HOOVER,
Attorneys for Plaintiff.

State of Montana,
County of Cascade,—ss.

Ransom Cooper, being first duly sworn, deposes and says that he is one of the attorneys for plaintiff in the above-entitled action and that he has read the foregoing reply and knows the contents thereof, and that the matters and things therein stated and alleged are true according to the best knowledge, information and belief of affiant.

Affiant further says that the reason this verification is made by affiant and not by some officer of plaintiff is that no officer of plaintiff is now within the county of Cascade or State of Montana wherein affiant is and resides.

[Seal] RANSOM COOPER.

Subscribed and sworn to before me this 25th day of January, A. D. 1917.

W. H. HOOVER,
Notary Public for the State of Montana, Residing at
Great Falls in Said County.

My commission expires February 2, 1917.

Filed Jan. 27, 1917. Geo. W. Sproule, Clerk.

Service of within Reply admitted Jan. 26, 1917.

SCOTT, BANCROFT, MARTIN &
STEPHENS and

NORRIS & HURD,
Attys. for Defendant. [76]

Thereafter, on December 3d, 1917, statement of the evidence as approved was duly filed herein, in the words and figures following, to wit: [77]

In the District Court of the United States, District of Montana.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Cor-
poration,

Defendant.

**Statement of the Evidence to be Included in Record
on Appeal.**

Testimony of A. D. Mackey in Behalf of Plaintiff.

Direct Examination by Mr. HOOVER.

A. D. MACKEY, a witness in behalf of plaintiff, was called and sworn and testified in substance as follows:

My name is A. D. Mackey. I am president of The Mackey Wall Plaster Co., the plaintiff in this action, and have the active management and control of its affairs. I have read the complaint in this action. At all times mentioned in the complaint I was the president and acting manager of the plaintiff. I am familiar with the premises described in the complaint and in the agreement referred to in the complaint as entered into on June 15, 1909. The plain-

(Testimony of A. D. Mackey.)

tiff was the owner of those premises on June 15, 1909. I personally negotiated with the officers of the defendant for the making of the lease and agreement dated June 15, 1909. This lease and agreement was entered into of my own knowledge with S. L. Avery who was president of the United States Gypsum Co. at that time. [78]

The original lease and agreement of June 15, 1909, was exhibited to witness, by him identified and introduced in evidence as Plaintiff's Exhibit One. This exhibit is identical in language with exhibit "A" set forth as a part of defendant's answer and reference is made to exhibit "A" of defendant's answer for the wording of exhibit one of plaintiff.

The plaintiff entered into a further agreement with the defendant in the nature of a renewal agreement dated July 1, 1910. The original renewal agreement of that date was exhibited to and identified by witness and was introduced in evidence as Plaintiff's Exhibit Two and is identical in wording with exhibit "A" attached to and made a part of plaintiff's amended complaint. Mr. MacLeish, one of the solicitors for defendant, stated that defendant would admit all the documents subject to an opportunity to inspect them and thereby save time, and the Court consented thereto.

The original agreement dated July 6, 1915, between plaintiff and defendant was exhibited to witness, by him identified and introduced in evidence as Plaintiff's Exhibit Number Three and is in wording identical with exhibit "B" attached to the

(Testimony of A. D. Mackey.)
amended complaint of plaintiff.

Plaintiff's Exhibit Four was exhibited to witness and by him identified and introduced in evidence and is as follows:

**Plaintiff's Exhibit 4—Letter, July 14, 1915, Knode
to U. S. Gypsum Co.**

July 14, 1915.

United States Gypsum Company,
205 West Monroe Street,
Chicago, Illinois.

Dear Sirs:

"We consider the terms of the supplemental contract made [79] by us with your company on July 6, 1915, as clear and unambiguous, but in order that there may be no question whatsoever as to the terms thereof, we are writing you our construction of the same.

"The lease and option given to you by us, as contained in the agreements of June 15, 1909, and July 1, 1910, are in all things and respects extended and renewed and continued in full force for a term of one year from July 6, 1915.

"The only change therein is that in case you fail to notify us of your election not to purchase, on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties, chattels, leases, rights

(Testimony of A. D. Mackey.)

and interests described in paragraphs 'Second' and 'Third' of said last mentioned contract, together with any and all other properties, chattels, leases, rights and interests mentioned in the contracts of June 15, 1909, and July 1, 1910, above mentioned. And upon such conveyances being made by us, then you are to pay to us the consideration mentioned in said contracts that the times and in the manner therein stated, the first payment of Fifteen Thousand Dollars (\$15,000) to be made upon the execution and delivery by us of the conveyances above mentioned.

"The notice to be given under said contract of July 6, 1915, shall be sufficient, if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either of us at the City of Great Falls, County of Cascade [80] State of Montana."

Yours very truly,

O. M. KNODE,

Managing Operator.

Q. Mr. Mackey, did the Mackey Wall Plaster Company to your knowledge receive a notice in writing to the effect that the defendant had elected not to purchase the properties mentioned in the agreements referred to in the complaint?

By Mr. MACLEISH.—If the Court, please, I think I will have to object to that question. It calls for a statement from the witness in one of the issues in this case which is to be decided by the Court. I think the proper way to get at it is to state what was

(Testimony of A. D. Mackey.)

received and what was sent, so that we may have the question not foreclosed by the witnesses' answer.

By the COURT.—Yes, probably.

I received a letter from O. M. Knode dated April 19th with regard to the exercise or failure of defendant to exercise the option of defendant. I received that letter on the morning of April 22d. Witness identified original letter and same was introduced in evidence as plaintiff's exhibit five and reads as follows:

Plaintiff's Exhibit 5—Letter, April 19, 1913, Knode to Mackey.

UNITED STATES GYPSUM CO.

205 W. Monroe St.

Chicago, April 19, 1916. [81]

Mr. A. D. Mackey,

1224 Chestnut Street,

Minneapolis, Minn.

Dear Sir:

"On May 5th our option to purchase your mill property at Great Falls expires.

"I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.

"We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless.

"If you care to come down and talk the matter

over we will be glad to have you do so.

“Expect to give you formal notice on May 5th that we do not care to purchase your property.”

Yours truly,

(Sgd.) O. M. KNODE,
Manager Operations.

OMK/M.

I went to Chicago on April 28th and had a conversation with the officers of defendant with reference to the matter mentioned in that letter. I talked with O. M. Knode in his private office. He is the only officer of the defendant I talked with on the subject. I talked with other officers on other matters.

I called at the general office of the Gypsum Company a little before eleven o'clock A. M. and sent my name into Mr. [82] Knode and was promptly taken into his private office, shook hands, and he at once asked me a number of questions regarding the physical condition of my wife. We went over that subject nicely and was done and then I said, “Well, Mr. Knode, what are the conditions in Montana? I am entirely in the dark, I haven't even received a letter from Mr. Cooper this year.” He immediately says, “Well, I can tell you how things are in every respect at present in Montana.” He says, “The Hanover folks are going ahead, they have got their foundation floor in and they have got their mill machinery contracted for, and, in a very short time, they will be on the market with their product, and they are coming on the market with a very much less mill price than we have at Great Falls, and,” he says,

“We thought we could hand it to them pretty nicely a while ago; we got an option lease on adjoining property of theirs; we put our expert men to work drilling there endeavoring to find the same deposit they had, but we met with quite a surprise, for there was no deposit there, and, now,” he says, “We are on another hunt for a deposit east of Hanover a considerable distance, and we have reasons for believing that we will find a satisfactory deposit; if we should find one, why, we would be in very good condition to have the Hanover folks realize that we are still in Montana doing business, because we can ship our raw material into Great Falls, as we are now shipping it in, on the same basis as we are now shipping it in from Riceville, and then,” he said, “The Hanover folks have started out wrong, they shouldn’t have built that mill there, they should have built the mill in Great Falls.” I said, “Well, I cannot agree with you.” “Yes,” he says, “there’s many reasons that make it an advantage in favor of Great Falls.” I says, “I certainly don’t agree with you on that.” [83]

When we were done with that phase of it, I said, “I had intended to bring over from the hotel a blue-print of the Riceville Mine that your Mr. Nold gave me last July; I neglected to, but I will bring it over when I come back after lunch.” He says, “That’s not necessary, we have office copies on file here” and he pushed a button and a page came and he told him what he wanted and in two minutes it was there, a blue-print copy of *the and* the moment I seen it I said, “Well now, I will not have to ask so many

(Testimony of A. D. Mackey.)

questions, I guess, for I can understand this blue-print. Right from the start, it is a different blue-print from the one that I have. I am not saying this as any reflection but simply a blue-print of a different period of time. A minute or two after that, into Mr. Knode's office came Mr. Nold, the mining expert, engineer of the company, and he sat down and promptly Mr. Knode commenced asking him questions regarding his idea of the condition of the Riceville Mine, and he asked him a great many questions and Mr. Nold gave careful thought to the questions and answered them along, and I remember one of the questions was, "How long would the Riceville Mine be able to supply the requirements of the Great Falls Mill if no more work were done excepting removing the gypsum from the roof and the floor?" and Mr. Nold figured a minute or two and he said, "Why, there ought to be tonnage enough in the roof and the floor to run that mill for three or four years, but, of course," he says, "The refuse that is on the floor would have to be taken out of the mine on to the dump and that would cost some money, it would mean labor."

The conversation took a very wide range. Mr. Knode told me of the efforts they had going on for years, that I didn't know of, in different ways, searching for a satisfactory [84] deposit of gypsum close to a railroad that would be permitted to be put on without much expense, on the cars, and run in; he spoke of the Sun River and different places where he had been, many places he had been himself

(Testimony of A. D. Mackey.)

and he had had his field men out and he said he had to be frank and say that up to date they had never found anything that had a commercial value, that was available to a railroad.

We visited along, and I said to— directing my question to both of them— I said, “Well, what about Albright? What about your agreement made with Mr. Cooper and I that if we would extend this lease a year that you would run a tunnel in on the Albright land at a cost of five to seven thousand dollars and work out our gypsum from the downhill pole?” Immediately Mr. Nold spoke up and he says, “What would be the use? Albright has got no gypsum.” I said, “Is that so? Well, hasn’t he got as much gypsum as he had in July, 1915 and as he had up to a very few months ago”? And then Mr. Knode said, “Well, I will tell you, Mr. Mackey,” he said, “We have had quite a time with Mr. Albright. I wrote several times regarding the matter, I was asking Mr. Cooper to be a little more strenuous in his efforts to get a lease for us from Mr. Albright”; he said “Albright started out with a price of twenty-five cents a ton royalty, which was prohibitive.” He says, “Mr. Cooper, later on, was able to show that to him and at last,” he says, “why, Mr. Cooper, got a price of ten cents a ton royalty from him.” “Well,” I said, “that was all right, that ten cents.” “Yes,” he says, “we had no objection to that price, but,” he said, “Albright wanted the minimum amount of royalty to amount to a thousand dollars a year and he wanted the royalty to apply for five years,

(Testimony of A. D. Mackey.)

whether or not." And I said, "Well, that looks all right to me." [85]

The conversation did not eventually swing into anything concerning my property. We spoke about United States geologist's bulletins.

I asked Mr. Nold if he had ever seen the Government's Fort Benton folio. He thought he had not. I said, "it is worth looking at it; I have it with me at my hotel" and I said, "How are you fixed up for lunch"? and he says, "I am open." I said "All right, if you have got a clear conscience and a good appetite, you lunch with me and I will show you the folio." He said he would be pleased to and he looked at his watch and he said "Now, I will excuse myself now, because it is getting about a quarter to twelve and these things piled pretty high on my desk to-day, and," he says, "I will see you in thirty minutes at your hotel." I thanked him and he disappeared from the room, so Mr. Knode and I we talked along a few minutes and finally I glanced at my watch and I said "I guess I better be working over to the hotel, my guest might get there ahead of me." And then Mr. Knode said "Well, Mr. Mackey," he said, "On May 5th, or May 4th, whichever date it may be," he says, "we will send you our formal notice that we do not care to purchase your property." I said, "Well, whatever you folks decide to do, you may send to me care of Mr. Ransom Cooper." He turned his chair to the left, opened a drawer or something,—it might not have been to his desk, but he took out of it a good-sized memo-

(Testimony of A. D. Mackey.)

random pad and he commenced doing some writing; as he finished his writing he said aloud "Care of Ransom Cooper," put his pad where he got it, turned his chair around facing me and I said, "Well, I was just thinking, Mr. Knode, that there must come times that the work that piles up on you and Mr. Nold must be something pretty fierce." "Well," he says, "it certainly does, Mr. Mackey, and right now is one of the high peaks." [86] "Already this year," he says, "we have had three labor troubles and," he says, "In June, we are going to have a big one at Fort Dodge."

Nothing further was said in that conversation about my properties or the option or lease of them. I later kept my appointment with Mr. Nold. I told Mr. Knode I would see him after lunch. Mr. Nold and I had lunch together at the hotel. During our conversation at lunch, our conversation took a very wide range, we looked at this folio a few minutes in my room, then we went down to the cafe, and there was an interesting place for both of us, we both had a good appetite, and we was there over an hour at the table, and as we ate and visited along, I said to Mr. Nold, "I wonder what Mr. Knode is figuring on; I haven't got him lined up right; I wonder what is in his mind." "Well," he says, "I don't know but I would guess that the company would like to continue the lease for a year, or two years, or three years, just as it is now, and hoping that in the meantime they can find a bed that can be very advantageously sent into Great Falls on the trains and used."

(Testimony of A. D. Mackey.)

He asked me what the property cost me when it was built. I told him the amount. He figured a few minutes and he says, "Well, now, it may be a surprise to you to know what wonderful conditions are now"; he says, "I believe, Mr. Mackey, it will cost twenty-five thousand dollars more to produce that property to-day than when you built it." I said, "Yes, I know that things are about as high as a man can look."

Nothing further was said about what the Gypsum Company proposed to do with my property and nothing was said about the company exercising the option or lease of my property. After lunch I went back to the office of the defendant and met Mr. Sam Fulton, vice-president of the company. [87] Nothing was said to him about the exercise by the defendant of the option to purchase or the leasing of my property. I also had a conversation with Mr. Meserve, the secretary of the company, but nothing was said to him about the lease or option on my property. I had another conversation with Mr. Knode that afternoon. As soon as I was done with Fulton and Meserve, I went up to the office of Mr. Nold and he took me into Mr. Knode's office. Mr. Knode came in shortly thereafter and said: "Well, Mr. Mackey, what is on your mind this afternoon?" And I said, "Well, Mr. Knode, practically speaking, my mind is a blank," I said, "I told you this morning what my wife's condition had temporarily done to me," and I said, "What is on your mind, Mr. Knode? He thought a minute and he said, "Well, Mr. Mackey,

(Testimony of A. D. Mackey.)

if my ideas should meet with approbation by the company" he said, "this is what I would favor," he says, "I would favor continuing the lease as it now is, we paying our rent monthly in advance and we giving your company a ninety days' notice in case there should come a time that we wished to cancel the lease." And I said, "Well, Mr. Knode, whatever you folks have to say," I said, "put it in writing and send it to me care of Mr. Ransom Cooper." He said, "All right, are you going to Great Falls soon?" I said, "Very promptly going to spend three or four months out there in that state with my wife." "Well, now," he said, "will you give us a prompt answer"? I said, "Yes, certainly, will talk it over with Mr. Cooper when I get out there." He said, "You know our pebble contracts that we have with Portland Cement Companies, we have to make those contracts ahead and we have to know what we are going to be able to do and say to them." I said, "Yes, there will be no delay in our answering you." And so that was about all, and I looked at his desk and I said, "Well, I think of nothing more, Mr. Knode, and if you don't, I will give you a heart handshake [88] and I will get away and let you go at this rubbish here; and he said, "Well, something has got to be done with it," he says, "it is getting fierce." And so I shook hands with him and stepped out of his office; out of the main office I turned to the left and went to Mr. Nold's desk and

I said, "Well, Mr. Nold, I will give you a hearty handshake and I will start back to Minneapolis this evening." And he at once said, "Well, what did you

(Testimony of A. D. Mackey.)

and Mr. Knode do?" I said, "We didn't do anything," I said, "Mr. Knode is going to write us, Mr. Cooper, and," I said, "we are going to look over what he says and," I said, "he wanted to know if I could assure him of a prompt answer and I told him we could." He said, "When are you going to Great Falls?" I said, "In a very few days; I am going to take my wife to Riceville and out to Neihart and spend several months." I said, "When are you going out to Montana, Mr. Nold"? He threw up his hands and he says, "I can't answer such questions as that; I never know." He says, "A wire comes and I go east or I go south,— or I go." He says, "I never make plans as to when I am to be anywhere."

I did not have any further conversation with Mr. Nold before I left the building. After I got to the hotel I rang up Mr. Knode by phone and said: "Mr. Knode, I forgot to ask you for the customary letter of permit to look at the mill and the mine." He always gave me a letter saying that myself and my wife had the privilege of looking at the property. And he said, "Certainly, Mr. Mackey, and," he says, "I will include Mr. Cooper's name in the permit." And I said, "I thank you." He says, "I will mail it to you to Minneapolis"; and I thanked him and hung up the phone.

Since that time and conversation I have had no talk with Mr. Knode about exercising the lease and option upon my [89] property. I did not receive any notice from the defendant in my capacity as president of plaintiff or personally that the de-

(Testimony of A. D. Mackey.)

defendant did not wish to exercise its option on the property between the time I was in Chicago and May 5th. Shortly after May 5th I caused to be executed a deed to the property described in the several agreements and an assignment of the shares of the capital stock of The Mackey Wall Plaster Company to the defendant.

Plaintiff then offered in evidence as its exhibits six and seven the deed and assignment referred to. Defendant objected to the introduction of Plaintiff's Exhibit Seven, the assignments, upon the ground that the same were immaterial. The defendant by its solicitor MacLeish stated that it did not deny that the deeds were sent to the defendant and by the defendant returned to the plaintiff and did not deny that the assignment and shares of stock of plaintiff company were sent to the defendant and by the defendant returned to plaintiff, the defendant declining to accept the deeds and assignments for the reason that defendant had not purchased the property. Witness identified Plaintiff's Exhibit Eight and same was introduced in evidence and reads as follows:

**Plaintiff's Exhibit 8—Letter, July 5, 1916, Mackey
Wall Plaster Co. to U. S. Gypsum Co.**

July 5, 1916.

United States Gypsum Co.,
205 West Monroe Street,
Chicago, Ill.

Gentlemen:—

“Since you have elected to purchase the property

of the Mackey Wall Plaster Company mentioned and described in a certain agreement between yourself and the undersigned dated June 15, 1909, in accordance with the [90] terms and conditions of said agreement and of the agreements between yourself and the undersigned dated July 1, 1910, and July 6, 1915, respectively, we beg to hand you herewith a Deed of Conveyance executed and acknowledged by the Mackey Wall Plaster Company, conveying to you all of the property, real and personal, described in and referred to in the said agreement dated June 15, 1909. In accordance with the terms and conditions and provisions of said several agreements, we also beg to hand you an instrument in writing dated July 5, 1916, executed and acknowledged by A. D. Mackey and Myra Post Mackey granting and assigning to you all of the issued shares of stock of the Mackey Wall Plaster Company together with the certificates representing such shares, thereby assigning to you all of the issued and outstanding shares of the capital stock of the said Mackey Wall Plaster Company.”

“Upon receipt of these instruments and at your early convenience, we will thank you, after deducting the amount of the indebtedness of the Mackey Wall Plaster Company to you upon its note held by you from the \$15,000 cash payment due upon the purchase price, to send us the balance of the cash and your seven (7) notes of \$5,000 each, bearing date on which said cash payment is made, payable to the undersigned, one in three months and the others respectively in six, nine, twelve, fifteen, eighteen and twenty-one months after the date thereof with inter-

(Testimony of A. D. Mackey.)

est thereon at the rate of five per cent per annum from the date thereof until paid.”

“In the event that you decide to retain the shares of stock by the instrument second above mentioned assigned to you, kindly make the notes payable to the undersigned [91] A. D. Mackey and Myra Post Mackey. But if you decide not to retain the shares of stock, then said notes should be made payable to the Mackey Wall Plaster Company.”

“In respect to the subject matter of your letter of June 29, 1916, we beg to say that in view of your election to purchase the property of the Mackey Wall Plaster Company at Great Falls and Riceville, as we construe your acts the Mackey Wall Plaster Company has nothing to receive or take from you except the purchase price of said property.”

Enc.

Very truly yours,

(Sgd.) THE MACKEY WALL PLASTER
CO.,

By A. D. MACKEY,
President.

Plaintiff's Exhibit Nine, Ten, Eleven and Twelve were introduced in evidence for the purpose of showing the title in plaintiff to the property described in its amended complaint and the agreements therein referred to.

Cross-examination by *RM.* A. E. MACLEISH.

At the time these leases were made my wife and I were the owners of all the shares of the Mackey Wall Plaster Company except two; one share was owned

(Testimony of A. D. Mackey.)

by Mr. Cooper and one by his stenographer. I think there were five hundred and fifteen shares issued. I owned one hundred and ninety-eight and my wife three hundred and fifteen. I was president of the company during all the times negotiations were carried on with the defendant and the manager of its affairs. The plaintiff was not a going concern after it made the lease to the defendant. I have known Mr. Knode nine or ten years. The first business transactions between the plaintiff and defendant were had between me and Mr. Avery, the president of the defendant, and later the business transactions were had with Mr. Knode. [92] At the time the last extension of the lease and agreement was made on July 6, 1915, there was no discussion between me and Mr. Knode as to whether or not there were workable gypsum deposits in the Riceville properties. There was a discussion as to obtaining gypsum from properties other than those owned by the plaintiff. We had some discussion concerning the want of workable gypsum, the high mining cost and that the deposit could not be taken out economically. At the time the last extension was made there was an entire day put in here in Great Falls and the proposition was discussed between us to the effect that if the lease would be extended for a year or more the defendant would lease the Albright property and would run a tunnel in that would cost from five to seven thousand dollars. This was to be in the nature of prospect work on the property of the plaintiff and the Albright property and was to be done by the de-

(Testimony of A. D. Mackey.)

defendant to find if the deposit could be economically worked. They (referring to Mr. Knode and Mr. Nold) said it could be done or they would not squander from five to seven thousand dollars going into it blind. They said at this time that the property could be economically worked. The extension was not made for the purpose of giving the defendant an opportunity to investigate and prospect the property. There was nothing put into the extension agreement about running this tunnel. We talked that over in the presence of Mr. Cooper. I said to Mr. Knode and Mr. Nold before the extension agreement was executed that if they would say all those things they said to me before Mr. Cooper that we would try to do something for them. We talked further that night and the extension agreement was drawn up the next morning. I corresponded with the defendant after July 1915 relative to prospect work on the property. Several letters [93] passed between me and the defendant after July, 1915, and before I went to Chicago the last time. Mr. Knode wrote me as late as December, 1915, that he was after Mr. Cooper to get the Albright land signed up. These letters were in connection with the prospect work that was being done by the defendant on the property. I do not recall receiving a letter from Mr. Knode or Mr. Nold in which it was stated that "conditions at the Riceville mine are about as explained to you last summer." I did not talk with Mr. Nold after the month of July, 1915, During the month of July at the time the last extension agree-

(Testimony of A. D. Mackey.)

ment was made I talked with Mr. Nold about the conditions at the Riceville mine. I did not see Mr. Nold in December, 1915. I received a letter from Mr. Knode dated December 5, 1915, in which he stated that "conditions at the Riceville mine are about as explained to you last summer." The conditions at the Riceville mine which were explained to me in July, 1915, were expensive mining, dip was going to the north, every ton had to be hauled uphill and one entrance had a block and tackle. I told them in July that when they paid me a little nominal consideration I would disclose to them knowledge that I had paid for a long time ago. After they signed up with me I disclosed that knowledge. Prior to July, 1915, they did not know what I had in mind. I did not know what they had in mind in the letter stating that the prospect work had not been very encouraging up to that time. The extension agreement dated July 6, 1915, was not made until July 14, 1915, I remember very well concerning the making of that agreement. Mr. Knode had no legal authority to sign up with me so he took the bunch of papers into Chicago for the president and secretary to sign. Mr. Cooper and I had already signed. I was living at the hotel Maryland, [94] Minneapolis, Minnesota, when I received the letter heretofore identified by me dated April 19, 1916. For several months I had been receiving communications from the defendant there. Upon receipt of this letter on April 22d, 1916, I answered promptly saying that I would go to Chicago. I received a letter from

(Testimony of A. D. Mackey.)

the defendant dated April 24, 1916. Witness here identified the letter of April 24, 1916. I went to Chicago in reply to that letter and arrived on Friday, April 28th. I met there Mr. Nold and Mr. Knode. I met Mr. Nold first and then went into Mr. Knode's Office. Shortly thereafter Mr. Nold came into Mr. Knode's office. The supplemental lease dated July 6, 1915, provides that "The lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property, it will at least sixty days prior to the first day of July, 1916, give notice to the lessor." I wrote a letter dated May 12, 1916, addressed to the defendant in which I stated that no notice had been given to me and assumed that the defendant was ready to take conveyance of the property. When I wrote that letter I did not have knowledge of the fact that the defendant had determined not to purchase the property.

Q. How could you assume, Mr. Mackey, in the letter of May 12th, 1916, or make the statement that the United States Gypsum Company had failed to give the notice, unless you knew that it had determined not to purchase?

A. Well, their not giving the notice was the reverse; if they did not give the notice, then they elected to purchase.

Q. Oh, that is the way you look at the agreement?

A. Yes, had to be that way. [95]

When I was in Mr. Knode's office in Chicago, he told me that the defendant would not purchase my

(Testimony of A. D. Mackey.)

property and further stated that he would send me a formal notice on May 4th or 5th. Mr. Knode said to me about four minutes before I left his office at noon and he said it in this way exactly, identically; he said, "Mr. Mackey, on May 5th"—hesitated—"on May 4th, which ever the date may be, we will send you our formal notice that we do not desire to purchase your property." I answered, I said, "Well, whatever your company decides to do, you may send to me care of Mr. Ransom Cooper." He turned his office chair to the left and got out a good-sized memorandum pad, commenced writing on it, and as he finished his writing, he said aloud, "Care of Mr. Ransom Cooper," put his pad back and turned his chair back facing me. That was the only time that Mr. Knode said that they would not purchase the property.

Mr. Nold was not present when this conversation took place. He had been out of the office about ten minutes. During the time I was in Chicago, Mr. Knode made no other reference to the notice to be given to me. There was no conversation between Mr. Knode and me when Mr. Nold was present concerning the fact that the defendant would not take this property. During lunch I did not say anything to Mr. Nold about the memorandum made by Mr. Knode. I could have said it with propriety, because I was groping around and wondering what Mr. Knode had up his sleeve, and I let it come out to the surface, I said to Mr. Nold, "I wonder what Mr. Knode is figuring on, I wonder what he is work-

(Testimony of A. D. Mackey.)

ing at." He said, "I don't know, but it would be my guess that they would like to continue the lease I believe one year or two years or three years." So, as far as Mr. Nold is concerned, when I left him that afternoon, he had never heard from me that Mr. Knode had said that he was [96] going to mail the formal notice.

At that time I did not know that any notice which the defendant was required to send me must be sent sixty days prior to July 1, 1916. I knew there was a sixty days' notice provided for on the agreement but did not read the agreement carefully at the time it was signed because it was signed in a hurry. Mr. Knode was in a rush to get away. I always knew that a sixty days' notice was provided for but did not find out that this notice was to be given sixty days prior to July 1, 1916, until Mr. Cooper was reading the lease to me in his office in May. I cannot state the exact time in May when Mr. Cooper read to me the lease but it was a day or two after my arrival in Montana, which was in the early part of May, might have been the 3d, 4th or 5th of May. When I learned the facts concerning the sixty days' notice I did not communicate with Mr. Knode. The first communication I had with him after my visit to Chicago was one dated May 12, 1916. When I came to Great Falls and Mr. Cooper was reading to me the lease I first learned that sixty days' notice must be given prior to July 1, 1916. I had knowledge of the fact that Mr. Knode had said to me in Chicago that he would send a notice that the defendant would

(Testimony of A. D. Mackey.)

not take the property on May 4th, or 5th, 1916. I waited until May 12th, 1916, and then wrote the letter in which I stated that "you failed to give me notice."

Q. So that, as I take it, the first time that you learned of the alleged failure to give this notice, was when you came to Great Falls and consulted with Mr. Cooper.

A. Yes, sir; I called on him each day and asked him if he had any Gypsum mail from Chicago and he said, "No"; then he said, "Well, I guess I have got an explanation for it, Mr. Mackey," he said, "Important papers of corporation now are very often registered." [97]

I recall having received the letter from the defendant dated April 19, 1916, in which Mr. Knode stated that the defendant would have to terminate its relations with me at the end of the lease. I had that letter in mind when I wrote the defendant that it had not given me any notice. When I was in Chicago I talked with Mr. Knode and Mr. Nold concerning the making of a new lease. When I went back after dinner, after lunch, and Mr. Knode asked me what was on my mind, and I handed it back by asking what was on his mind, and he said, "Well, if it met with his company's approbation, he would favor a continuing of the lease, their taking their rent monthly in advance, they to give ninety days' notice in case they wished to surrender the property." In response to this statement of Mr. Knode I said, "Well, you put in writing what you folks have

(Testimony of A. D. Mackey.)

in mind and send it to Mr. Cooper.” That is one of the writings which I wanted Mr. Knode to send to Great Falls. I also expected his formal notice that he was going to prepare on May 4th or 5th, that was item one that was to come to Mr. Cooper; that is the one he made the memorandum about, that was before lunch. After lunch, was this other matter of his proposal that he would like to continue the lease; I said, “Put in writing whatever you folks have in your mind and send it to Mr. Cooper,” and he wanted to know if I would answer promptly, told him we would; told me the importance of having all the time possible because of the pebble contracts with Portland Companies.

I intended to go back to Minneapolis from Chicago, left Chicago that evening, April 28th. I received the letter from the defendant introducing me to their superintendent in Minneapolis. It got to Minneapolis the day I arrived there. [98] I arrived in Minneapolis for breakfast and the letter arrived that afternoon. I told Mr. Knode I was going to Great Falls promptly. I did not ask Mr. Knode to send the letter introducing me to Minneapolis. I was surprised when I received it in Minneapolis. I thought it would come to Great Falls. Letters addressed to me at Minneapolis, 1224 Chestnut Street, were usually delayed in reaching me. I have no recollection of telling Mr. Knode to send the letter introducing me to the superintendent, to the Maryland Hotel, Minneapolis. I will not state that I did not so direct Mr. Knode. Witness was

(Testimony of A. D. Mackey.)

shown and identified a letter addressed to him dated April 29, 1916, and a copy of a letter addressed to G. W. Marquardt, superintendent, and witness stated that he received these two letters in Minneapolis, or copies of them. Mr. Knode mailed them to me the day after I was in his office. Mr. Knode did not call a stenographer into his office during the time I was there. The only additional person in the office was a young man I have referred to as a page who answered the push button and got instructions to bring in a blue-print. He then disappeared and that was the only time he was there. The letter addressed to G. W. Marquardt, superintendent, was not dictated to a stenographer by Mr. Knode in my presence. It is not a fact that at the same time another letter was dictated to the superintendent and sent to Great Falls by Mr. Knode while I was in his office. Unless the page was a stenographer, there was no stenographer present in Mr. Knode's office while I was there. After I left Mr. Knode's office I telephoned him from the hotel that I had forgotten to ask for my usual letter. It was in this phone conversation with him that I asked for those letters. I wanted the letters so that I could look over the properties. There was no discussion concerning my examination [99] of the property for the purpose of making a new lease. I have always asked for those letters. There was no discussion with Mr. Knode concerning my examination of the properties in reference to the making of a new lease. Nothing was said about that at all. I left the Gypsum Company's offices about

(Testimony of A. D. Mackey.)

3:15, I think. Yes, I talked with Mr. Knode over the phone after I left his office. I did not suggest that the permit be given to me, Mrs. Mackey and Mr. Cooper. I did not mention Mr. Cooper and never did. His name had never before been in a letter to the superintendent. Mr. Knode merely said, "I will give you the letter of introduction and also give it to Mr. Cooper," and I thanked him for his courtesy. When I shook hands with Mr. Nold and said good-bye I told him that Mr. Knode and I did not do anything and that Mr. Knode was going to take the matter up with his company and whatever the company decided to do it would notify me of in Great Falls. That is what I meant by saying that Mr. Knode was going to write to Mr. Cooper. This conversation with Mr. Nold occurred just as I was leaving the building about 3:15. Mr. Knode said that they would send me a notice that they would not purchase my property. He said to me, just before I left for lunch, "Mr. Mackey, on May 5th," and then he hesitated, "on May 4th, whichever the date is," he says, "we will send you our formal notice that we do not desire to purchase your property." And I said, "Well, whatever you folks decide to do," I said, "you may send to me care of Mr. Ransom Cooper," and then he turned around and made his memorandum.

When we were discussing the making of a new lease I had no means of knowing what they had in mind. I was in the dark. They had a right to send that notice and they had a right not to. It was not a

(Testimony of A. D. Mackey.)

fact that when I left the office of the [100] Gypsum Company I was aware that the defendant had decided not to buy my property, if that had been their position. I know just a little about business and know that the thing then for them to have done was to have written out that formal notice and handed it to me and taken a receipt for it at the time. I went to Chicago in response to the suggestion of the defendant because I wished to talk the matter over. I wanted to find out what the conditions were in Montana referred to in that letter suggesting that I come to Chicago, I mean the conditions of the mine in Montana. I wanted to hear what they had to say. I don't think the defendant had decided not to buy the property at that time. I thought there was a string tied to the lay-out. I did not go to Chicago for the purpose of finding out why the defendant had decided not to buy my property. They had not said they were not going to. There is a letter right there which you have read which down at the bottom says, "we expect to do so and so." I smiled when I got that letter and said to myself, "Well, that is pretty smooth." I meant by being pretty smooth, that they had not said anything and they were left in a position to do or not do, as they might later on determine. Mr. Cooper did not tell me this. I got that out of this old gray stuff in my head.

Q. Now, will you please tell me what you went to Chicago for.

A. Well, I guess curiosity; we all have curiosity; it wasn't very expensive, I am pretty economical,—

(Testimony of A. D. Mackey.)

it wasn't a very expensive trip—and to hear what they had to say.

My wife was sick at the time and I delayed going on account of her illness. I decided to go simply for curiosity—perhaps information is the better definition of it. I had not thought what information I would get from going to Chicago. [101] I wanted to hear them talk and I wanted to ask some questions. I wanted to ask how it come that they were hotfooted up to a certain day to get the Albright lease and presto change in a day, why there was nothing doing. There was some other things I wanted to know which I don't think of now.

I received a letter at Great Falls from the defendant dated May 11, 1916. It stated, "that we are willing, however, to enter into an extension of these contracts whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contracts can be extended for the term of one year, subject to cancellation upon sixty days' written notice given by us to you of our intention to terminate the same, rental payable monthly in advance, instead of yearly as heretofore." We have got that letter in our files.

Q. That language which I have read to you contains in substance, does it not, the proposition for a new lease which you and Mr. Knode discussed in Chicago?

A. That is a proposition of some kind; I never read it but once; it came here and they did not know what to do with it, so it went over to his office here

(Testimony of A. D. Mackey.)

across the river and the superintendent was courteous enough to find out where I was and send the letter to me.

Q. Doesn't it, Mr. Mackey, contain in substance the proposition that you asked Mr. Knode to write to you in Great Falls?

A. Oh, I have no idea what they were going to write.

Mr. Knode stated to me in Chicago that if the company would acquiesce in his idea, he would favor continuing the lease subject to cancellation on ninety days' notice. I said to him, "Whatever your company decides to do in the matter put in writing and send it out." I received the letter and [102] it speaks for itself. I did not examine the mill property or the Riceville property when I arrived in Great Falls. Those letters of introduction were for the purpose of permitting me to examine the properties. My main purpose in coming out here was not to examine the properties. I wanted to see if the trip would not do my wife some physical good and it did her a whole lot of good. It is not a fact that I wanted to examine the property in connection with the new negotiations for a lease that had arisen between Mr. Knode and me in Chicago. It is not true that I intended to use the letters for that purpose when I came to Great Falls. I always asked for such letters on coming out here. It had gotten to be a habit with me. It is not true that I decided not to use the letters after I talked with Mr. Cooper. I don't think I told him of that letter for some time.

(Testimony of A. D. Mackey.)

I phoned over to the Gypsum Company's office and told them I had a letter of introduction but was not physically able to present it. I talked with the young man in the office. I did not get the superintendent. I was not very well after my arrival in Great Falls. Mr. Knode said something to me about the Hanover people going ahead. That discussion came up concerning what position they would be in as a competitor and I recall now that just as I was leaving his office in the afternoon, he spoke, "Are you going to Great Falls promptly?" and I said, "Yes." He says, "Here is a thought,—go Milwaukee from Minneapolis and," he said, "you can stop over at Lewistown and it is only a few miles out, go out and see the Hanover, what they are doing." I said, "I am not interested in what they are doing." Perhaps this conversation came up concerning the Hanover mill in connection with the unwillingness of the defendant to buy my property. It might have been so stated in words during [103] this conversation.

The Riceville mine is located near Riceville, Montana, that is about a mile and a half away. The properties that were leased to the defendant consisted of rights to mine gypsum. The *entire* of the gypsum was in fee simple absolutely. The gypsum beds underlie some of the property. One piece of the property represents the right of way for a wagon road, but there is no gypsum under that. Another piece represents a ninety-nine year lease, but it does not amount to anything. I don't recall any quarter

(Testimony of A. D. Mackey.)

section of land under a ninety-nine year lease. The mill property is located at Great Falls. It is a gypsum mill, the foundations of which are of stone and concrete. It has all the mill machinery inside. It is located upon property leased from the Great Northern Railway Company. That mill is an important part in operating the properties of the company. It is operated as a gypsum mill.

(Witness excused.)

(Plaintiff rests.)

DEFENDANT'S CASE.

Testimony of O. M. Knode, for Defendant.

O. M. KNODE, a witness sworn on behalf of defendant, testified as follows:

Direct Examination by Mr. MACLEISH.

My name is O. M. Knode. I reside at Chicago, Illinois. I am one of the vice-presidents of the United States Gypsum Company and manager of its operations. I have been actively engaged as manager of operations of defendant about ten years and during that time I have had negotiations with the Mackey Wall Plaster Company. [104]

I made the original investigation of the Mackey property with Mr. Mackey in March, 1909, and the lease was then made later by Mr. Avery, and, at the end of the first year, it was renewed by Mr. Avery and myself, and since that time I have handled the matter entirely for the company with Mr. Mackey.

The property of the plaintiff consisted of first,

(Testimony of O. M. Knode.)

what is known as a two-kettle gypsum calcining mill located on lands owned by the Great Northern Railroad across the Missouri River; it is a frame building on concrete, stone and brick foundation; one and two-story building, contains the usual plaster mill machinery for manufacturing plaster or parts.

That is the point where the rock is ground and actually manufactured into finished products.

The mining property consists of, I think it is, 240 acres of mineral land, that is to say, the mineral rights were in the Mackey Wall Plaster Company. The mine itself consisted of an open cut or tunnel, in fact there were three tunnels, the first two failed, the gypsum gave out as the workings were carried under the mountain. There was also a right of way connecting the mine with the Great Northern Railroad track.

It was supposed to be a wagon road, but it was laid out on quarter section lines, or section lines, and which carried it down through valley gullies which were so rough that it would be impossible for them to be used for that purpose; it also included the right to the 160 acres which Mr. MacLeish mentioned. I refer to the 160 acres about which you have just asked Mr. Mackey. That is held under a 99-year lease. [105]

That was located north of the other properties about a mile on Belt Creek. This lease carried the privilege to the Mackey Company to erect a mill, and to use it for all other purposes excepting agricultural.

(Testimony of O. M. Knode.)

The mill and the mill site are a substantial part of the properties. I refer to the mill and mill site at Great Falls on the leased property. They were the physical part that was most valuable, for without the mineral, were virtually valueless.

Mr. Nold and I negotiated the last extension on July 6, 1915. These negotiations were had at the Rainbow Hotel in Great Falls where we met Mr. Mackey at the time. We gave Mr. Mackey a complete and detailed report of the exact physical condition of the entire property. In substance, the physical conditions were, the factory itself was in good condition; the mine was in such condition that we were fearful that we could not find enough rock to operate the property through another year, or, at most, longer than a year. The various tunnels and workings had encountered a fault, in fact, the fault had been encountered about two years prior to that time. A fault is a condition in a mine where some foreign matter has been thrust into the deposit, eliminating or removing or destroying the mineral, in this instance gypsum.

The deposit where it was opened is nearly fifteen feet thick. At the working faces, as they existed in July, 1915, the face averages from four to five feet and in many places was as low as three feet, and some places had pinched out entirely. The seam was pitching towards the working faces and away from the opening, and in many places, the grade was so great that it was impossible to haul the rock out with any means at hand or to put in equipment to take it

(Testimony of O. M. Knode.)

out at a reasonable cost. The entire situation was explained [106] to Mr. Mackey by Mr. Nold and me, as we had visited the mine the day before we met Mr. Mackey. Mr. Nold is the general superintendent of the company and also the chief engineer of mines.

At that time there was a discussion concerning the prospecting for gypsum in that locality and we told Mr. Mackey that if he cared to renew the lease for another year, that we would prospect further in the Riceville Mine in an effort to get through the fault, and also that we would look into the Albright gypsum and endeavor to get a tunnel through from Albright to the Mackey property and do everything in our power to make the Mackey mine a workable property. Following this conversation the extension agreement was signed up. The defendant during the period of that extension did prospecting work. We drove the tunnels forward in the best places in the fault, in fact, in all of the places that were then open, in an endeavor to get through, but found that they pinched out entirely, or became so thin that it was impossible to work them without a very high cost. We took up through Mr. Cooper the question of securing a lease from Mr. Albright. He brought about a tentative arrangement that was satisfactory to us, but our workings in the Mackey property towards the Albright property gave out, as had the rest of them, and it developed that it was impossible to drive a tunnel through to join the Mackey property. Further investigation of the Albright

(Testimony of O. M. Knode.)

gypsum showed that it was merely a fringe on the side of a hill and that the quantity was negligible. These facts were made known to Mr. Mackey in Chicago, April 28th, 1916.

I am the person who wrote the letter to Mr. Mackey of April 19, 1916. Following that I received a reply from him dated April 22, 1916; I replied to that letter by a letter addressed to Mr. Mackey dated April 24, 1916. Letter of [107] April 22, 1916, and copy of letter dated April 24, 1916, referred to by witness were identified by him and introduced in evidence as Defendant's Exhibits "A" and "B," which were read to the court and are as follows:

**Defendant's Exhibit "A"—Letter, April 22, 1916,
Mackey to Knode.**

Minneapolis, Minn., Apr. 22d, 1916.

My dear Mr. Knode,

"Your letter was mailed to '1224 Chestnut Ave.' and so was delayed in reaching me.

"My wife has recently lost her only sister—and at present she herself is not at all well—and I feel that I should not leave her just now, but if you are to be in your office next week Thursday, the 27th, I will see you then if wife is no worse."

Very truly yours,

(Sgd.) A. D. MACKEY.

Please wire me.

**Defendant's Exhibit "B"—Letter, April 24, 1916,
U. S. Gypsum Co. to Mackey.**

April 24, 1916.

Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

Dear Sir:

"Your letter of the 22d at hand.

"We would prefer to have you come in, so as to be here on Friday, if you can arrange it.

"Mr. Nold will be out of town until Friday morning and I should like to have him here to talk to you regarding the condition of the Riceville Mine."

Yours very truly,

(Sgd.) UNITED STATES GYPSUM CO.

By O. M. KNODE,
Manager of Operations.

OMK.S. [108]

Following the letter of April 24, 1916, Mr. Mackey came to Chicago. He arrived on Friday, April 28th. Mr. Mackey came to the office about 9:30, sent in his name, and I told the office boy to bring him in, and, at the same time, asked Mr. Nold to come in. Mr. Mackey arrived first and I shook hands with him and asked him how he was. While I was doing that, Mr. Nold came in and he spoke to Mr. Nold and they both took chairs and sat down. I said, "Mr. Mackey, I have asked you to come down here to explain to you why we have decided not to take your property, not to exercise our option. We have been prospecting industriously since I saw you last; we have had Mr.

(Testimony of O. M. Knode.)

Shoemaker, our mine superintendent, working on the Albright property in the Riceville Mine, and he has done everything possible to locate gypsum at Riceville, if it is there, and he has failed utterly, and we are convinced that it is not there. We have looked over the other available deposits in Montana and there isn't one that offers a source of supply for your mill, and we have, therefore, concluded to turn your mill back to you when the contract expires. In reply to that Mr. Mackey said, "Well, what is the matter with the Albright property?" "There is gypsum there showing the outcropping." I said, "Yes, Mr. Mackey, it does show, but it is merely a fringe, at its greatest width it is not much over 100 feet wide and that isn't enough to warrant the expenditure of the money necessary to open it up." He said, "Mr. Cooper got you the lease with Mr. Albright?" I said, "Yes, Mr. Cooper got the terms of the lease, made them satisfactory to us, but we never exercised the lease, or entered into it, because there was nothing to be gained, in view of the fact that the quantity of gypsum is not sufficient to warrant opening up." I said, "Furthermore, the Hanover people, whom I wrote you about last [109] December, have come into the territory actively, they are building a mill, and that introduces new competition which materially alters the situation and makes the territory less attractive to us." And Mr. Mackey said, "Well, they won't ever amount to anything; there is no gypsum at Lewistown." I said, "Well, Mr. Mackey, we have had a man at Lewiston since late in December; we have taken an option on a piece of property, and

(Testimony of O. M. Knode.)

have drilled, and while it is true we haven't found any gypsum, the Hanover people have what is reported to us to be a very excellent deposit of gypsum, with large croppings on the surface and with perhaps two hundred thousand tons entirely uncovered and exposed ready to be taken into a mill, which can be located within 500 feet of the main line of the Milwaukee and the Great Northern. If their deposit is what it is reported to be, they have every advantage over you in your situation, because they can take their gypsum to the railroad for little or nothing."

Mr. Mackey asked a number of questions which I answered, and, finally he said, "Well, Mr. Knode, if you won't take the property, what will you do, what can you do?" I said, "Mr. Mackey, there is only one thing that we are willing to do and that is to continue the lease for an indefinite period on such terms that we can retire from the property whenever the gypsum becomes exhausted, or is exhausted to such an extent that we cannot operate it to advantage, or at a profit." "Well, what do you mean by that? What kind of terms have you in mind?" he said. I said, "The only thing we would consider would be a short term lease, or a lease for a specific term, say a year, subject to a cancellation clause of perhaps thirty days, or might make it a little longer than that, it might be too short, but a lease that would let us get out as soon as we couldn't secure the gypsum." [110]

Mr. Mackey asked about the brands that we were manufacturing. "Are you making my old quality brand?" I said, "Yes, we are still manufacturing

(Testimony of O. M. Knode.)

that and we are also manufacturing ivory and alabaster." And he asked what percentage of the different brands we made. I said, "We don't know, depended on what the customer wanted; if they wanted quality, that is what we furnished." He then asked if we had any of his jute bags left that he had sold us. I said, "Yes, I thought we had five or ten thousand, which we would sell him back again in accordance with the terms of the original contract." Mr. Mackey asked if we would put our lease proposition in writing. I said, "Yes," and just exactly what we would do in the matter of terms is something that I haven't decided as yet, something I would want to talk over with the other members of the company, but generally speaking, what I have said to you is the terms under which we would go ahead with the proposition. He said, "Well, I wish you would put that in writing and I will go out to Great Falls; I can't go for a few days, because Mrs. Mackey is sick." I further said to him, "I will let you know what I decide to do." He said, "I will have to have a letter of introduction to your Superintendent; he won't let me in if I don't have it." I said, "All right, Mr. Mackey, I will be glad to give it to you." This last-mentioned conversation was in my office in the afternoon after he had returned from lunch with Mr. Nold. Between the morning and the afternoon conference Mr. Mackey went out to lunch with Mr. Nold and returned with him. Mr. Nold remained in my office throughout the entire day during the conference with Mr. Mackey. During the conference I asked Mr. Mackey what information they

(Testimony of O. M. Knode.)

had gathered through their examination of the government folio, which Mr. Mackey had stated he had in his possession, and his answer to [111] that was that Mr. Nold apparently did not think very much of the Government's engineer's report on the gypsum formation at Riceville. Mr. Nold spoke up and said, "No, if that engineer was writing the gypsum report of the Riceville section at this time, it would read differently, because the Mackay *working* are now there and disclose new information, and because other openings have been made in an effort to discover gypsum, and he would have more information." During the afternoon the lease was mentioned again and I repeated that I would take it up and write Mr. Mackey within a short time stating exactly what we would do or giving him our exact offer for a renewal of the lease. During the conference Mr. Mackey requested that he be given letters of introduction to the Superintendent of defendant. I said, "Yes, Mr. Mackey, I will be glad to give you the letters," and rung my bell for the stenographer, whom Mr. Mackey has described as a page, and he came in with his book and I dictated the two letters to Mr. Marquardt at that time in Mr. Mackey's presence, and also Mr. Nold's. Mr. Nold was present at all times. Witness was shown copy of letter dated April 29, 1916, addressed to G. W. Marquardt, superintendent, Great Falls, Montana, and asked if that is the letter which witness dictated in the presence of Mr. Mackey. He replied that it was the letter and that he sent the original letter to Mr. Mackey, Mary-

land Hotel, Minneapolis, together with a letter to Mr. Mackey. Witness identified the two letters and the same were introduced as the Defendant's Exhibits "C" and "D."

**Defendant's Exhibit "C"—Letter, April 29, 1916,
Knode to Marquardt.**

April 29, 1916.

C. W. Marquardt, Supt.,
Great Falls,
Montana.

Dear Sir: [112]

"This will introduce Mr. A. D. Mackey, owner of the mill at Great Falls and the mine at Riceville, which we are operating.

"Please extend every courtesy to Mr. and Mrs. Mackey, and their attorney, Mr. Cooper, and permit them to examine the mill and mine in as great detail as they desire.

"Do everything you can to assist them."

Yours very truly,

OMKS.

**Defendant's Exhibit "D"—Letter, April 29, 1916,
Knode to Mackey.**

April 29, 1916.

Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

Dear Sir:

"Herewith I hand you letter of introduction to Mr. Marquardt, our Superintendent at Great Falls,

which will serve as your permission to go thru the mill and mine."

Yours very truly,

OMK.S.

I dictated these two letters in the presence of Mr. Mackey and Mr. Nold. Witness was shown a letter dated at Chicago, April 29th, 1916, and stated that this was the other letter dictated in the presence of Mr. Mackey, and was sent to the superintendent of defendant, Mr. Marquardt, at Great Falls. Letter identified and offered in evidence as Defendant's Exhibit "E." [113]

**Defendant's Exhibit "E"—Letter, April 29, 1916,
Knode to Marquardt.**

Chicago, April 29, 1916.

Mr. A. D. Mackey.

G. W. Marquardt, Supt.,
Great Falls.

"Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property, to determine what course of action he will take, and whether or not he will renew the lease with us.

"The time expires on the fifth day of July. At this time, if the lease is not renewed, we will withdraw from the property.

"We want you to continue operating the mill just as though it was going to operate for an indefinite length of time, except it will be well for you to let your stocks run down.

(Testimony of O. M. Knode.)

“We will probably decide within the course of three or four weeks whether or not we are to continue the lease. In any event, we want you to feel that we are going to take care of you, no matter what the decision may be with reference to the lease. We want you to go ahead with full knowledge that you are not going to be out of a job in the event the lease is not renewed.

OMK.S.”

I mentioned Mr. Cooper in this letter for the reason that Mr. Mackey asked me to include Mr. Cooper and Mrs. Mackey so that they could be taken through the property [114] also. As before stated, Mr. Nold was present during the whole of the conversation between Mr. Mackey and me, both in the morning and in the afternoon.

After I stated to Mr. Mackey that the defendant would not buy the property of the Mackey Wall Plaster Company, he first inquired about the gypsum deposits and we described our efforts since we had seen him last to find the gypsum and he said, “Well, I am sure the gypsum is there, and I am confident that I can find it, and I shall have to operate the property myself.” That was after the discussion concerning the making of a new lease. After this conversation he enquired about the bags, the tags, the brands and the general situation in Montana, and talked along as to how he would operate the property said that he wasn’t an old man yet by any means, described what he would do. After about ten minutes of that, he changed the subject slightly by say-

(Testimony of O. M. Knode.)

ing, "I don't want to operate that property, what can you do? What will you do, Mr. Node?" I said "Mr. Mackey, there is only one thing that the company can do and is willing to do, and that is to continue the present arrangement with the view to finding gypsum." Following this Mr. Mackey said, "Well, under what terms would you continue?" I said, "We haven't considered that matter particularly, Mr. Mackey; I would have to think that over, but, in general, we would renew the lease in its general terms but for a short period and with the privilege to us of canceling on short notice when the mineral showed signs of exhaustion; my idea of the cancellation of the paper would be about thirty days." Mr. Mackey said that would be entirely too short. I said, "Well, we might make that sixty or ninety, it would not be material, but it must be a short cancellation clause." [115] Following this Mr. Mackey said, "I wish you would think over what sort of a proposition you will make me in the way of a lease and put it in writing and send it to me and I will go to Great Falls and look into the situation, and I would like to have that proposition there, so that I can decide what to do, and after I have gone into the thing, I will give you my answer."

There was nothing said at any time during the conversation with Mr. Mackey about sending a formal written notice by May 4th or 5th notifying the Mackey Wall Plaster Company that the defendant would not purchase his property. Mr. Mackey had, by his conduct throughout the conversation, indi-

(Testimony of O. M. Knode.)

cated that that matter was settled and took up the question of our keeping the property on a lease. Mr. Mackey did not at any time during our conversation question the sufficiency of the notice or the letter of April 19, 1916. Mr. Mackey did not at any time say anything that would lead me to believe that he questioned the information or notice contained in the letter of April 19, 1916, or the statement made by me that the company would not purchase his property. I did not write anything on a pad of paper during the time he was talking to me. I know Mr. Cooper very well, have known him for about a year in person but had known him through contracts and through his connection as secretary of the Mackey Co. I talked of him with Mr. Mackey a great many times. I knew his full name and where he resided. I did not have any telephone conversation or receive any telephone message from Mr. Mackey after he left my office on the afternoon of April 28, 1916, concerning any letters of introduction to the superintendent. Mr. Mackey left my office about four o'clock and I left my office within a very few minutes thereafter. I went home and [116] did not return to my office that evening. Mr. Nold was in my office when Mr. Mackey left. After Mr. Mackey was in my office on April 28th, I wrote a letter to the Mackey Wall Plaster Company. Witness identified a copy of this letter and the same was introduced and read in evidence as Defendant's Exhibit "F."

**Defendant's Exhibit "F"—Letter, May 11, 1916,
U. S. Gypsum Co. to Mackey.**

May 11, 1916.

A. D. Mackey, President,
Mackey Wall Plaster Company,
Great Falls, Cascade County, Montana.

Dear Sir:

"We wrote you on April 19th last that we would not purchase the property under the agreements made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreements.

"With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operation at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein. [117]

"We are willing, however, to enter into an extension of these contracts, whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty

(Testimony of O. M. Knode.)

days' written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore."

Very truly yours,

UNITED STATES GYPSUM COMPANY.

O. M. KNODE,

Manager of Operations.

OMK.S.

Mr. Mackey did not reply to this letter. Except for the letters of introduction no letters were written by me or the defendant to Mr. Mackey or the plaintiff and no letters were written by Mr. Mackey or the plaintiff to me or the defendant after our conversation of April 28, 1916, and prior to May 11, 1916. A letter dated May 12, 1916, from the Mackey Wall Plaster Company to the United States Gypsum Company and a letter dated May 17, 1916, from the United States Gypsum Company to A. D. Mackey and a letter dated May 25, 1916, from the United States Gypsum Company to A. D. Mackey, and a letter dated June 8, 1916, from the United States Gypsum Company to the Mackey Wall Plaster Company were exhibited to witness and identified by him and were introduced in evidence and read to the court as Defendant's Exhibit "G."

(Exhibit "G" read to the Court is as follows:)

[118]

**Defendant's Exhibit "G"—Letter, May 12, 1916,
Mackey Wall Plaster Co. to U. S. Gypsum Co.**

COOPER, STEPHENSON & HOOVER,
Attorneys at Law.

Great Falls, Montana, May 12th, 1916.

United States Gypsum Company,
205 W. Monroe St.,
Chicago, Ill.

Gentlemen:

"Since you did not give notice in writing to any of the undersigned of at least sixty days before the first day of July, 1916, of an intention not to purchase in accordance with the provisions of the agreement between you and the undersigned, dated July 6, 1915, and have therefore elected to purchase the property described in and upon the terms and conditions of the several contracts existing between you and the undersigned dated respectively June 1, 1909, July 1, 1910, and July 6, 1915, it has occurred to us that possibly you might wish to consummate the purchase by receiving the formal conveyances, necessary in the premises, before the time stipulated in the contracts. If this should be your desire we shall be glad to conform thereto."

Very truly yours,

MACKEY WALL PLASTER COMPANY.

By (Sgd.) A. D. MACKEY, Pres.

A. D. MACKEY.

MYRA POST MACKEY.

By RANSOM COOPER,

Attorney in Fact. [119]

**Defendant's Exhibit "G"—Letter, May 17, 1916,
U. S. Gypsum Co. to Mackey.**

May 17, 1916.

Mr. A. D. Mackey, President,
Mackey Wall Plaster Company,
Great Falls, Cascade County, Montana.

Dear Sir:

"We are in receipt of your favor of the 12th instant, signed by the Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, and are certainly surprised at its contents.

"You said we did not give notice of our intention not to purchase, to either the Mackey Wall Plaster Company, A. D. Mackey or Myra Post Mackey, at least sixty days before July 1st. The fact is, that on April 19th last we wrote you, that we would not purchase your properties, following which we conferred with you on April 22nd, when it was fully stated to you by us, that we would not purchase the same. You not only understood that we would not purchase, but at that time, accepted the situation, and entered into negotiations for a new lease at the end of the present term.

"Under these conditions, it could not have occurred to you, as stated in your letter, that we might wish to consummate the purchase, but on the contrary, you knew when your letter was written, that we had notified you fully of our intention not to purchase. Our letter to you of May 11th last, containing the proposition mentioned when you were here, probably passed yours of the 12th in the mail,

and we would be glad to hear from you in answer thereto."

Very truly yours,
UNITED STATES GYPSUM COMPANY.

Manager of Operations.

OMK.S. [120]

**Defendant's Exhibit "G"—Letter, May 25, 1916,
Knode to Mackey.**

May 25, 1916.

Mr. A. D. Mackey,
Riceville,
Montana.

Dear Sir:

"We have not heard from you in reply to our letters of May 11 and 16th.

"It occurred to us that these letters may not have reached you and we are, therefore, mailing you copies to Riceville, where we are informed you are staying at the present time, and also to your Minneapolis address."

Yours truly,

OMK.S.

6/5.

Copy to

Mr. A. D. Mackey,
Maryland Hotel,
Minneapolis, Minn.

**Defendant's Exhibit "G"—Letter, June 8, 1916,
U. S. Gypsum Co. to Mackey Wall Plaster Co.**

June 8, 1916.

Mackey Wall Plaster Company,
A. D. Mackey and Myra Post Mackey,
Great Falls, Montana.

Dear Sirs:

"We have your favor of the 29th ult. and cannot agree with you that you are justified in the course you have taken.

"You attempt to justify your position by the statement, that until we released ourselves from having the right to purchase the property by some act or omission you could not be released. It is difficult for us to see how we could have done anything more to preclude ourselves from having the right to purchase the property. As heretofore [121] stated, we advised you of our intention not to purchase on April 19th, 1916, and at a conference had with Mr. Mackey on April 22nd following we not only advised you that we would not purchase, but Mr. Mackey accepted the notice as final and entered into negotiations with us for a further lease of the premises. We can only conclude that your repeated statement, that you now seek to hold us to a purchase of the property because we did not release you, is not made in good faith, but for the purpose of attempting to justify your most unreasonable and unwarranted position.

"You call attention to the modification of the con-

tract of July 6, 1915, providing that notice of an intention not to purchase would be sufficient if deposited in the mails addressed to you at the city of Great Falls, County of Cascade, State of Montana, and say that we fully understand that this was not done. It is true our letter of April 19th was addressed to Mr. Mackey at 1224 Chestnut Street, Minnesota, but that he received the letter, cannot be denied. The notice, of which you speak, was sufficient if deposited in the mails addressed to either of you, and it is hardly fair for you to say, that our letter did not accomplish the purpose because it was not sent in compliance with the provisions of the contract. That is was not intended as notice of our intention not to purchase, as stated by you, is contrary to the expressed intent of the letter, and, if there could be any doubt as to this, it was made clear at our conference with Mr. Mackey on April 22nd.

“When Mr. Mackey left Chicago he had no intention other than to take up the question of the terms [122] of a new lease, and the position which you have since taken is not only a surprise to us, but seems to be an unwarranted attempt by you to insist upon a purchase of the property when you know that no such purchase was in fact made.

“In view of your attitude, we have turned the entire matter over to our attorneys, Messrs. Scott, Bancroft, Martin & Stephens, 1620 Corn Exchange Bank Building, Chicago, Illinois.”

Very truly yours,

UNITED STATES GYPSUM COMPANY.

(Testimony of O. M. Knode.)

In this correspondence the conference between Mr. Mackey and me is referred to as having taken place on April 22d, 1916. That is a mistake, the conference was had on April 28th, 1916. Following the correspondence heretofore mentioned, I sent a letter dated July 9, 1916, to the Mackey Wall Plaster Company and also a letter to that company dated July 11, 1916, and also another letter to that company dated July 20, 1916. Defendant offered these letters in evidence as Defendant's Exhibit "H." These letters had reference to the counterclaim of defendant set forth in its answer and the introduction in evidence of these letters was objected to by plaintiff on the ground that the same are irrelevant, incompetent and immaterial, and illustrate no issue. After a talk between the solicitors for the respective parties in the presence of the Court, it was agreed, with the permission of the Court, that the counterclaim of the defendant might be withdrawn without prejudice and defendant did not further insist upon the introduction of the three letters mentioned in evidence. It was thereupon stipulated by the solicitors [123] of the respective parties with the consent of the Court that the copy of the lease attached to Plaintiff's Exhibit One is a true copy of the lease between the Great Northern Railway Company and the Mackey Wall Plaster Company. Witness Knode further testified that the lease dated June 22, 1908, between the Great Northern Railway Company and the Mackey Wall Plaster Company provides, among other things, that the lessee shall

(Testimony of O. M. Knode.)

not and will not assign the lease or permit any other person or corporation to occupy or use any part of the demised premises without first having obtained the written consent of the lessor, its successors or assigns thereto and that the defendant had not received any such consent from the Mackey Wall Plaster Company or from anyone else.

Cross-examination by Mr. COOPER.

I wrote the letter hereinbefore referred to dated April 19, 1916. At the time I wrote that letter I was under the impression that the defendant had until May 5th to give the formal notice therein referred to. I do not recall when that impression was removed from my mind but it was subsequent to May 5th. I dictated that letter of May 11th and then talked the matter over with the attorneys of the defendant. I intended that letter of April 19th to be a formal notice that the defendant had elected not to purchase the property of plaintiff. I used the expression in the letter "except to give you formal notice on May 5th that we do not care to purchase your property" as information to Mr. Mackey in the event that he did not come to Chicago.

Q. Why didn't you say that then?

A. Because that last paragraph was put there with that thought in mind. [124]

Q. With what thought in mind?

A. That if Mr. Mackey was to come to Chicago, and talk over the matter, or a formal notice would be sent, that is exactly what I had in mind.

(Testimony of O. M. Knode.)

As a business man I am not as exact as a lawyer. I have no trouble in setting forth what I mean in my letters. My purpose in writing that letter was to get Mr. Mackey down to Chicago if he cared to come. I surmised that after the receipt of that letter Mr. Mackey would care to come to Chicago. After Mr. Mackey came to Chicago, Mr. Nold and I reported the conditions of the mining property as it actually existed, but not as dark as we could have reported it. We told him that the Albright property did not have any gypsum in them. We did not make any test on the Albright properties but the development work in the Mackey mine disclosed that the same fault that cut through the Mackey property also cut through the Albright property. When we were seeking to get an extension from the plaintiff in 1915 we were very earnest about getting a lease from Albright. Our purpose of securing a lease of the Albright property was to make an entry into the Albright property so that we would be able to take the Mackey gypsum out through the Albright property.

Q. Now, when you wrote this letter of May 11th, you had then discovered that it would be too late to send a notice on May 5th, hadn't you?

A. If any notice was necessary, but I did not accept for a moment that one was necessary.

I knew that subsequent to May 5th would be too late, that is, that May 6th would be too late. I had in mind the May 5th date by reason of the fact that the original lease expired on July 5th. I made a

(Testimony of O. M. Knode.)

mistake about the date of the [125] expiration of the 60 days' notice clause and that mistake continued up to about May 5th. I did not look at the lease again after Mr. Mackey was in my office.

Q. Now, when you wrote this letter of May 11th,—
“We wrote you on April 19th last that we would not purchase the property under the agreement made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreement.” Now, what did you write all that in there for?

A. That was a repetition of the conversation that was held with Mr. Mackey.

The repetition of our conversation in Chicago was made merely for the purpose of making a formal proposition for the lease. The making of this repetition was not absolutely necessary. I do not think I was seeking to make evidence in favor of defendant in writing that letter of May 11th. I had no such intention in mind. I had not made a mistake in respect to giving formal notice to Mr. Mackey. I had given Mr. Mackey notice in writing and he had accepted the notice in our talk. I did not give him a notice in writing and then say to him in the same writing that it was not to be considered as a notice. After our talk in Chicago Mr. Mackey did

(Testimony of O. M. Knode.)

not expect any further notice for the reason that he accepted our notice and left with the definite thought in mind that the Gypsum Co. was through, that it would not buy his property. He did not say so in so many words but his conversation and attitude indicated that. His attitude was more [126] than listening to our proposition, it was a definite entering into negotiations for a continuation of the agreement.

Q. Well, then, why didn't you refer to that in this letter of May 11th? You here apparently for the first time make him a proposition in the last clause of your letter.

A. That is almost *verbatim* the proposition I made him when he was in the office.

I testified a while ago that I told Mr. Mackey we were not in a position to make him a definite proposition until we had conferred with our associates.

And I did not make him a definite proposition only in the few brief details which are all that are covered in this proposition,—a year, a ninety-day cancellation clause, a continuation of the old lease, and that is what I said to Mr. Mackey at the time.

Q. What I can't get through my head, Mr. Knode, was why you should so specifically refer to the letter of April 19th and reiterate all about your giving him the notice, when it was so well understood between you that that notice was waived.

A. Well, I was merely putting in writing a resume of the conversation of the 28th.

Q. That is the explanation that you wish to make

(Testimony of O. M. Knode.)

to that. You, your company, entered into negotiations with Albright for the purpose of procuring a lease from Albright, didn't you?

A. Through you, yes, Mr. Cooper.

When the negotiations were about to be consummated to the extent of our getting a lease on the Albright property we discontinued those negotiations and for very good and sufficient reasons. The defendant did not have Mr. Mackey [127] pretty thoroughly in its power. We had loaned him \$8,000 the year before and had taken as security in pledge one hundred and ninety-eight shares of his stock in the Mackey Wall Plaster Company. This security was taken about the middle of July, 1915, and at the suggestion of Mr. Mackey. We offered to loan the money to Mr. Mackey and he offered the stock which was then up in the Great Falls National Bank and amounted to all except two shares of the capital stock of the company and we told him that we did not care for all of the stock. We took one hundred and ninety-eight shares.

Q. Yes. Then, as soon as Mr. Mackey notified you of his purpose to take the position that you had elected to purchase this property by your failing,—you then notified him that you were going to sell the stock, didn't you?

By Mr. MACLEISH.—I object to any questions concerning the personal loan that existed between A. D. Mackey of the Mackey Wall Plaster Company I don't think it is proper in this case. The loan, as shown, was one of a personal transaction between

(Testimony of O. M. Knode.)

the Gypsum Company and A. D. Mackey, not even parties to this suit at the present time, either on cross or direct.

By Mr. COOPER.—If the Court please, the witness here has assumed an attitude of fairness, or pretended to assume that attitude, and I want to show the real attitude.

By the COURT.—While it is true that there may be a dual transaction, Mr. Mackey and his wife are apparently the Plaintiff [128] in this case, it may not be entitled to much consideration, the Court will allow it to go in under the usual rule; the objection will be overruled and the exception can be noted. If this evidence is entitled to no consideration, the Court will give it none. If the appellate court will be of a different opinion, it will have it before it without sending the case back for trial. It is not so obviously irrelevant or immaterial that the Court would feel that it should be excluded altogether.

A. I didn't have any first-hand knowledge of that. I did not have any first-hand knowledge concerning the sale by the defendant of the Mackey stock. Mr. Fulton, treasurer of the defendant company, wrote the letter relative to that subject. The one hundred and ninety-eight shares of stock we had taken as security for \$8,000 were sold for \$98 according to my information but I have no first-hand knowledge of that fact. I was out of town at the time and I know of that transaction only in a general way.

I am not a geologist. I have been to the Mackey property at least once every year since the lease has

(Testimony of O. M. Knode.)

been in existence and sometimes twice and I have had the *advise* of Mr. Nold who is a thoroughly experienced mining engineer. My testimony is in part based upon statements made to me by Mr. Nold. That was my object in having Mr. Nold at the conference between Mr. Mackey and me. Mr. Nold was presumed to know more about the mine and the situation that I would. I did not meet Mr. Nold after Mr. Mackey left to go to lunch [129] and before Mr. Nold joined Mr. Mackey. Mr. Nold was present at all times during my conversation with Mr. Mackey. I had Mr. Nold there because the whole question hinged round the finding of gypsum and Mr. Nold had been right in Montana in November, which was six months later than I had been there, he knew more about the situation from that standpoint than anybody else and *out* object was to tell Mr. Mackey everything we knew about his property, to put him in as good position as possible to go on with the operation of it in the event he decided not to lease to us. We felt very kindly towards Mr. Mackey, and always had, and wanted to do everything we could for him. We wanted to do everything we could for Mr. Mackey.

Q. And you want to go on record now as saying, do you, Mr. Knode, that on April 19th, when you wrote Mr. Mackey that you were going to give him formal notice that you wouldn't take his property, that that was the only notice you ever intended to write him?

A. Unless Mr. Mackey didn't come to Chicago and

(Testimony of O. M. Knode.)

paid no attention to it, as he had to several letters.

I have not stated all that led me to feel that it was necessary to give Mr. Mackey any further notice. The conversation with him lasted all of three hours and a great many things were said during that time which had a bearing upon the impression that I formed of Mr. Mackey's position. I am a busy man and have a great many things on my mind. I do not think that the recollection of Mr. Mackey of that interview is better than mine. I think I would probably carry the details in my mind better than he would because this subject was in my mind at all times and it was not in Mr. [130] Mackey's mind only occasionally. The construction of the Hanover plant was a factor but not a deciding factor in the position of the defendant relative to its purchasing the Mackey property. We did try to persuade the stockholders of the Hanover Company not to construct a plant in Montana and told them of the situation in Montana and what it would mean to them if they were to put a large sum of money in a gypsum plant in Montana due to the fact that the business isn't in this territory. We did not threaten the stockholders of the Hanover Company with grilling competition. We threatened them with nothing.

Q. And didn't Mr. Miracle of that company tell you that he turned your letter over to the Attorney General? A. He may have; I didn't know that.

Redirect Examination.

(By Mr. MACLEISH.)

The loaning of money to Mr. Mackey was a per-

(Testimony of O. M. Knode.)

sonal loan to him and that money was loaned to him for the purpose of enabling him to pay a judgment and to protect his stock. At that time all his stock was put up on a loan and the bank was threatening foreclosure and a sale of his stock and under this condition we loaned him the money.

(Witness excused.)

Testimony of John H. Nold, for Defendant.

JOHN H. NOLD, being duly called and sworn as a witness in behalf of defendant, testified as follows:

Direct Examination.

(By Mr. MACLEISH.)

My name is John H. Nold. I reside in Chicago, [131] Illinois. I am general superintendent of the United States Gypsum Company and also in charge of its mines and quarry operations. I have been in charge of the quarries and mines since 1907. I have been general superintendent about a year and a half. I was not connected with the Gypsum Company prior to 1907. I came to Great Falls with Mr. Knode and met Mr. Mackey and Mr. Cooper and joined in the negotiations concerning the extension of the Mackey Wall Plaster Company lease in July, 1915. At that time I told Mr. Mackey, at Mr. Knode's request, just the conditions that we had encountered in operating his property. The first time the matter was taken up Mr. Mackey, Mr. Knode and I were present in the Rainbow Hotel and later it was all gone over again in Mr. Cooper's office with Mr. Cooper also present. At Mr. Cooper's office I told

(Testimony of John H. Nold.)

Mr. Cooper that we had encountered a fault on the Mackey property; that fault was encountered some time in 1914, as we advanced the workings in under the mountain side, we came to a point where the gypsum strata became thin, then turned down at a very sharp angle, in fact, almost on end, and, as we followed that, it ended. In other words, there was no more gypsum *beyond*. Up to that time, when the workings encountered those conditions, all along the faces we had pushed them ahead a reasonable distance, probably twenty or twenty-five feet, and then discontinued and got gypsum wherever we could along that face elsewhere. I told Mr. Cooper that the only way I knew to tell how wide the fault was, or whether it was the end of the gypsum, whether it was really a fault, was to simply pick out the most advantageous places and drive tunnels through, not in gypsum but in any strata that we encountered, trying to find gypsum *beyond* on the Mackey property. I said, "This will [132] take time; it takes time to drive those tunnels, and, unless we are given time, we will have to quit. If we have a year, we will have time to drive those tunnels and know more about the presence of gypsum on the Mackey property at Riceville that we know now."

At that time we were trying to go through a fault on the Mackey property and which we found out during operations later in the year was the end of the gypsum deposit. Following this conversation, Mr. Cooper took up the extension, giving us another year to operate the property.

(Testimony of John H. Nold.)

During that year, under my instructions, the tunnels were driven into this sandstone and foreign matter, and, without exception, none of them found any gypsum. In every instance, that was the end of it. Not only was that done, but our mining engineer, who was also in charge of the work out there, Mr. Shoemaker, thoroughly prospected properties around the Mackey property, north of it and east of it, and made thorough report, and I visited there, and went over them thoroughly with him; there was drilling done; there was openings made, and at no place were we able to find gypsum, and, not only that, Mr. Mackey, in July, 1915, seemed to have something up his sleeve as to where there was gypsum.

He did not disclose very much about that to us at the time but I surmised it was around there some place and I thought if it was there, I would beat him to it, so I told Mr. Shoemaker about it and a very diligent search was made all along Belt Creek to find gypsum anywhere, and I visited the property some time in November, 1915, and went over it very thoroughly, I spent over a week there right on the property and the surrounding properties, and, at the time of my visit there, I took into my confidence, or went to Mrs. Rice, the [133] widow of Mr. Rice, after whom Riceville was named, and Walter Rice, and asked them if they knew of any gypsum on Belt Creek.

Everything was done from a mining standpoint to try and discover gypsum at Riceville or around Rice-

(Testimony of John H. Nold.)

ville. The result was that we did not find any gypsum either on the Mackey property or surrounding property. I was present when Mr. Mackey came to Chicago on April 28th, 1916.

On the morning of April 28, 1916, I had returned from the east, at a call from Mr. Knode stating that Mr. Mackey would be there on Friday morning. About some time between nine and ten o'clock, I should say, I was in Mr. Knode's office talking with him when Mr. Mackey was announced. I left the room, Mr. Mackey went in Mr. Knode's room, and my bell rang, Mr. Knode calling me, I followed Mr. Mackey directly into Mr. Knode's room and we shook hands with Mr. Mackey and sat down for a conference.

This was in the morning before lunch. Mr. Knode, Mr. Mackey and I were present. Mr. Knode opened the conversation by telling Mr. Mackey in words something like this: "Well, Mr. Mackey, we have decided not to buy your property; our investigations at Riceville and around Riceville, in fact, all around within striking distance of Great Falls, have not disclosed to us any gypsum deposit that is available for supplying gypsum rock to your mill at Great Falls."

This is about the substance of all that Mr. Knode said and Mr. Mackey replied: "Weren't you able to find gypsum on Rice's property?" Mr. Knode said: "We have not been able to find gypsum anywhere." "Well," Mr. Mackey says, "the gypsum is there all right." Mr. Knode said, "I wish you would tell us

(Testimony of John H. Nold.)

where it is; you haven't told us; we have followed several leads that you gave us without any success."

Mr. [134] Mackey says, "The gypsum is there and I can find it, and, if you don't want to operate the property, why, I will operate it." Mr. Knode says, "That is your privilege, of course, to operate the property," and Mr. Mackey asked concerning the business.

Mr. Mackey talked concerning the business and asked what brands of material we were making, he asked whether we had any of his old bags and whether we would sell them to him, and he asked about tonnage and a number of things, and led me to believe, at least, that Mr. Mackey was taking a stand that he was going to operate the property and he talked that way for a while and then he says, "I don't know as I want to operate that property"; he says, "Are you sure that gypsum isn't there?" Mr. Knode assured him again that it wasn't, at least, we didn't know that it was, couldn't find it, and he says, "What will you do with the property, what can you do with the property, what could I do with the property?" Mr. Knode says, "I don't know exactly what can be done with it, it looks almost hopeless to us"; he said, "The only proposition that we would consider at all with your property, would be to continue, as we have been operating it, a sufficient length of time to mine and work through your mill what gypsum there is available or what gypsum we may be able to find as we are operating on that basis." Mr. Mackey asked how long he thought that would

(Testimony of John H. Nold.)

be, how long it would be, and, it was at that time, as I recall, that a blue-print was sent for and brought in. Mr. Knode asked me how much gypsum was there, how long I thought it would operate with the tonnage we were taking out and I said, "We have in sight remaining in the mine in the roof, possibly some in the floor, gypsum to run that plant six months, depending on what success we have in taking this gypsum out, which primarily [135] amounted to robbing the mine." I mean by robbing the mine that in working the mine at first, gypsum was left as a roof, because the strata overlying that was clay, which would fall down, so there were several feet of gypsum left as a roof in the first mining over it, that we found could be taken down to some advantage and reclaimed, because prior to this time we had had considerable trouble getting enough gypsum to keep our plant going from the Mackey mine and some of it had been taken down and used, "but," I said, "you have got to understand that if we operate the mine and take all of the gypsum it will leave the mine in shape so that it never can be entered again," because, as the roof rock is taken down, the strata beyond it falls, it is what holds it up. I said, "We might find gypsum enough to run the plant a year, we might find enough to run it two years, but, at the present time, there is not to exceed six months' supply of gypsum in sight for the Mackey mill." Mr. Mackey did not dispute that but talked about gypsum on Rice's property and all the way around, every place else but his property.

(Testimony of John H. Nold.)

We talked about the Albright property. I claimed to Mr. Mackey again that he must remember that at the time we talked about the Albright property in Mr. Cooper's office, the reason we wanted the Albright property was not because of the gypsum on Albright's, because, even if the gypsum was under the Albright property along the Mackey property, the little fringe of the hillside between the Mackey line and where it would outcrop on Albright is only a small strip of ground and there would be very little there. Our interest in the Albright property was to get an opening, another opening into the Mackey property and I said, "Mr. Mackey, the Albright property does not appeal to us now at all, because you have no gypsum on your property to go after [136] through Albright's; we have demonstrated to our satisfaction, and, I believe, to yours the gypsum does not exist on your property beyond just the small area that we have worked out."

Following the conversation concerning the physical condition of the property, Mr. Knode said that we would work the property, if Mr. Mackey would consent on a lease continuing the way we were on the short-time cancellation and Mr. Mackey says, "Well, you would lease it from year to year, wouldn't you?" "No," Mr. Knode said, "we wouldn't, because there isn't gypsum enough there." "Well," he said, "you would pay me a year's rent, wouldn't you?" "No," Mr. Knode said, "we would pay the rent from month to month and would want to cancel it on thirty-days' notice." Mr. Mackey

(Testimony of John H. Nold.)

says, "that's awful short notice." Mr. Knode said, "Well, we might make that longer, the notice, sixty days, might make it as much as ninety days, but we couldn't possibly even enter into an agreement to operate your property under lease for a year, as much as a year's period." Mr. Mackey took the position that there was gypsum there and argued it. It was lunch-time by that time and Mr. Knode requested that I would take Mr. Mackey out to lunch and Mr. Mackey suggested that we go to lunch, that we go over to his hotel, where he had a government portfolio that disclosed gypsum on Belt Creek. We left the office and started to go to lunch. As I recall, I was detained at my desk, somebody there, or something of that kind, I was detained, expected to be only a few minutes, but it was probably fifteen or twenty minutes. Mr. Mackey went on over to the Morrison Hotel and I followed him and met him in the lobby of the hotel and he took me up to his room; I went up to his room in the Morrison Hotel and he had the Government portfolio, I don't recall the Government geologist who had worked that up, [137] but it was the Fort Benton folio that covered a great deal of territory, but did go into the gypsum deposits of Belt Creek. The folio was quite old, had been written before there had been practically any—before there had been any development of gypsum on Belt Creek and we looked it all over and I said, "Mr. Mackey, if that man had written that book during the last year, it would read entirely different from what it reads now, because he didn't

(Testimony of John H. Nold.)

know anything about it, he just saw a little gypsum here and there, and later developments have shown that what he said were thick veins of gypsum and thin veins of gypsum were not veins of gypsum at all, there were pieces of gypsum on the mountain side but did not extend in under the hill, and, furthermore," I said, "Mr. Mackey, this gypsum that you are looking at and calling the one that you have opened up at your mine is not the gypsum the geologist is talking about at all, because the highest gypsum that he saw above Belt Creek was about four hundred and some feet and yours is over a thousand, so he never got up to yours at all"; and we probably put in twenty to twenty-five minutes just discussing the gypsum and its occurrence there. Mr. Mackey closed the book and said to me, he says, "If your company operate that on *on* a lease, how long do you think that they will operate it?" I says, "Mr. Mackey, that is hard to tell, but I feel sure that they will operate it as long as there is any gypsum there; I don't see why they wouldn't, because we haven't found any other gypsum as close to Great Falls as yours at Riceville." I says, "I am sure it is six months, I believe it will be a year, it might be two years."

This was the conversation that took place in Mr. Mackey's room. After that we went to lunch. To the best of my recollection we did not talk the business question, at [138] least during lunch. Following lunch we returned together to the office, Mr. Knode had not returned from lunch, or his appoint-

(Testimony of John H. Nold.)

ment, whichever it was, and Mr. Mackey sat down in Mr. Knode's office and I went to work at my desk. After some—at least, thirty minutes anyway probably, Mr. Knode came in. Mr. Knode, in passing my desk, asked me to come in his room, and the conference with Mr. Mackey. I then went into Mr. Knode's room and he and Mr. Mackey were present. Mr. Knode asked, "Well, what did you find in the book?" and Mr. Mackey remarked, he said, "Nold doesn't seem to think much about what the Government man says about gypsum," and I said, "no, because, he didn't know, gypsum hadn't been developed at that time and what he says about it in the book is past history, we know more about gypsum on there, the time we have put in at it, and the money we have spent in prospecting and developing than he possibly could have known. Mr. Mackey then asked Mr. Knode what he thought about gypsum from somewhere else, how about gypsum from Geyser, Montana, he knowing that we had tested it, and Mr. Knode told Mr. Mackey that we had made a thorough investigation of the gypsum at Geyser, even to the extent of having a car of it loaded from that deposit and shipped in to the Mackey mill and tested. That gypsum contains oil and salt to an extent that renders it unuseful for plaster products. Mr. Mackey asked how about Lewistown, in around there. He says, "You are prospecting there." Mr. Knode says, "Up to the present time, although we have had a man around Lewistown since the latter part of December, we have been unable yet to find

(Testimony of John H. Nold.)

any gypsum deposit at Lewistown." Mr. Mackey says, "Well, it is mighty bad, but you make a proposition, tell me what you will do." Mr. Knode says, "I can't tell you very well, because it has not [139] been discussed a great deal what we will do, what we are going to do," and Mr. Mackey says, "I am going out to Great Falls and look that thing over thoroughly myself, going out there, I can't go right away,"—he spoke of his wife's illness and I think some other matters, "but I will get out there in the course of ten days or two weeks and look over the matter thoroughly. I am going out to Riceville and live right on that and look at it and you send me out there the best proposition, the proposition that you will make to operate that property and I will consider it. Mr. Knode said he would do that but he said, "We would have to have a pretty prompt answer, because we want to know what we are going to do." And he says, "I will answer it promptly when I get out there." That apparently ended the conference; Mr. Mackey says, "When I go out there, I will have to have a pass to get into your properties and I wish that you would give me a letter to your superintendent so that I can go through the properties." Mr. Knode says, "We will gladly do that," and he rang the bell for a stenographer and the stenographer came in and Mr. Knode started to dictate a letter to the superintendent introducing Mr. Mackey; Mr. Mackey requested, he says, "Make that include Mrs. Mackey and Mr. Cooper," he says, "I may want them to go into this with me." Mr.

(Testimony of John H. Nold.)

Knodel says, "I will gladly do that" and he dictated a letter to our superintendent, including those names and requesting him to show them every courtesy, and facilitate them looking at the property. He also dictated another letter to our superintendent, telling him that Mr. Mackey would visit the property some time within the near future.

During this conversation Mr. Knodel, Mr. Mackey and I were present and these letters were dictated to stenographer Smith. Mr. Knodel also dictated a letter to our superintendent [140] telling him that Mr. Mackey would visit the property in the near future and telling him in the letter, he says, "We don't know how long we will operate at Great Falls, but you are to operate the mill and the plant just as if we were going to stay there right along, keep the property right intact," and in the course of the conversation, in talking about the properties, Mr. Mackey had asked how much material we had on hand in the way of rock and supplies and things of that kind and he had requested that we not stock up on him if he took the property, that is, pile a lot of material up that he would have to buy, and, in the letter that Mr. Knodel dictated to the superintendent, he suggested to him, or rather asked him, to let his stocks run down, not order a lot of material in, pending the time that we probably would quit operating.

The witness was then shown a letter marked Defendant's Exhibit "C" and also a letter marked Defendant's Exhibit "E" and stated that these were the two letters dictated by Mr. Knodel in the presence

(Testimony of John H. Nold.)

of himself and Mr. Mackey. After these letters were dictated and the stenographer left the room and we shook hands and said goodbye to Mr. Mackey, Mr. Mackey left, I went to my desk and Mr. Knode left the office within not less than a minute and a half after Mr. Mackey left. Mr. Knode did not come back to the office. Mr. Mackey at no time during the conversation questioned the sufficiency or wording of the letter of April 19, 1916. I do not recall that the letter was mentioned at all. There was no question about the notice at all. Mr. Mackey did not say anything about not having received notice of the intention of the Gypsum Company not to buy his property. Mr. Mackey did not at any time during the conversation say that he desired further notice of the intention of the Gypsum Company not to buy the property. During those conferences Mr. [141] Knode did not at any time say he would send a formal notice by the 4th or 5th of May or that he would send a formal notice at any time. Mr. Mackey and I left Mr. Knode's office together when we started to lunch. As I passed the clerk's desk, just outside of Mr. Knode's door, he told me there was someone who wished to see me. I excused myself and told Mr. Mackey that I could not go right then. Mr. Mackey went on out and I met him later at the hotel. There was no time during the morning conference when I went out of the office of Mr. Knode.

Mr. Mackey and I came back from lunch together; on reaching Mr. Knode's room, we found he had not returned, and I asked Mr. Mackey to have a chair

(Testimony of John H. Nold.)

and wait in Mr. Knode's room until his return, and I went out to my desk, which is just outside the door of Mr. Knode's room. Some short time later, Mr. Knode came in and passed my desk and requested that I come in the room with him, and I followed him right in the room. I was present from that time until Mr. Mackey left Mr. Knode. I did not observe Mr. Knode at any time write something on a pad and at the end of it say, "Ransom Cooper, Great Falls, Montana," or words to that effect. Mr. Knode did not write anything. I did not have any telephone conversation with Mr. Mackey after he left the office of the Gypsum Company that night. I know that Mr. Knode could not have had any telephone conversation with Mr. Mackey at the office because he was not there.

**Testimony of O. M. Knode, for Defendant
(Recalled).**

Mr. KNODE, recalled on behalf of defendant, and testified as follows:

Direct Examination.

(By Mr. MACLEISH.)

The letters, Defendant's Exhibits "C" and "E," are dated April 29, 1916. I dictated these letters the last thing [142] before Mr. Mackey left and I followed out immediately. The stenographer did not write the letters until the next morning because he knew I could not read and sign them until then. That is the custom of our office. The letters were

!(Testimony of O. M. Knode.)

written the following day.

(No cross-examination.)

By Mr. MACLEISH.—If the Court please, there are certain—we have here an Abstract of the Title to this property, made by the Hubbard Abstract Company, which I understand is a certified abstract company, we can offer in evidence the whole abstract, or just such portions of it, read it to the record, but, for the purpose of shortening the record, such portions of it as we desire to call attention to, and, if counsel will consent to my calling attention to those portions, I will offer in evidence the abstract.

By Mr. HOOVER.—We object to the introduction of the abstract, or any portion of it, upon the ground that it is incompetent, *irreletive* and immaterial, as counsel explained what he wished to show there.

By Mr. NORRIS.—On that feature of it, of course, we would be required to call Mr. Hubbard and have him prove that he is a certified abstracter, and has filed a bond required by the State of Montana with the State Treasurer to entitle this abstract to be *prima facie* evidence under the provisions of our statute; if counsel requires that, we can call Mr. Hubbard and show he is a certified and bonded abstracter, and, under the law, the abstract is entitled to be introduced in evidence and has the same force and effect—as if certified copies were introduced.

By Mr. HOOVER.—That was not the point of our objection. [143]

By Mr. NORRIS.—This abstract certifies and purports to be an abstract of the whole title of the prop-

(Testimony of O. M. Knode.)

erty down to December, 1916, which was some time subsequent to this transaction, so that it shows the title of the property up to that time.

By the COURT.—What is the purpose of introducing this abstract?

By Mr. MACLEISH.—To show the following: To show that the title to the land situated in lot seven of section two, township twenty, which is the piece of property called the leasehold and upon which the mill is constructed, that the title to that property is in the Great Northern Railway Company, subject to a mortgage or trust deed of six hundred million dollars to secure a bond issue of equal amount dated May 1, 1911, and subject to the lease given to the Mackey Wall Plaster Company dated June 22, 1908, for a term of ten years—July 1, 1908. That there is no consent on the record in writing, as provided in the lease, consenting either by the mortgagee or by the Railway Company to the assignment of the lease by the Mackey Wall Plaster Company to the United States Gypsum Company or anybody. That is what we desire to show as to the leasehold interest. I have stated, I believe, that that is the piece of property upon which the mill is situated.

We also desire to show by this Abstract that this piece of property known as the ninety-nine year lease, as subject to a tax sale, that part of it is encumbered by a mortgage dated December 5, 1905, recorded December 20, 1905, for the sum of one thousand dollars.

By Mr. HOOVER.—If I may ask, what property

(Testimony of O. M. Knode.)

is that as described in the original contract?

By Mr. MACLEISH.—That is the ninety-nine year lease, [144] part of which those mortgages are—is described as the Northeast quarter of the Northwest quarter of Section 14.

By Mr. COOPER.—Well, who is the property from? Is that the mill site?

By Mr. MACLEISH.—That is property, the title of which is in Villa Clara Albright.

By Mr. HOOVER.—In other words, that is the property described in this agreement as the description “a”?

By Mr. MACLEISH.—It will be that part which you hold by virtue of an instrument from Laura Wilson to A. D. Mackey dated April 11, 1908.

By Mr. HOOVER.—The property described here consists of four pieces.

By Mr. MACLEISH.—You have section fourteen, haven't you? Southwest quarter of section 14?

By Mr. HOOVER.—That is contained then in description “a”?

By Mr. MACLEISH.—Yes. Also for the purpose of showing that upon the northeast quarter of the southeast quarter of section fourteen, there is another mortgage of five hundred dollars from Laura Wilson and Vir Wilson dated November 15, 1905, and recorded December 20, 1905, both of which mortgages ante-date the lease or rights obtained by Mackey and the Mackey Wall Plaster Company.

Also a tax sale.

Also that the title to the west half of the southwest

(Testimony of O. M. Knode.)

quarter of section fourteen is in Laura Wilson, subject to some minor objections which I think perhaps, as far as title are concerned, could be readily cured, but especially subject to a tax sale.

Also that the title to the west half of the southwest quarter of section twenty-three, the title of which is in Mary [145] Rice, subject to a mortgage of May 15, 1907, and recorded May 20, 1907, for a consideration of thirty-eight hundred dollars.

That the title to the southeast quarter of the southwest quarter of section twenty-four and the east half of the northwest quarter and the northeast quarter of section twenty-five is in Thor A. Weggeland, subject to a tax sale.

Those are the questions that we desire to present through this abstract of title.

By Mr. HOOVER.—May it please the Court, we object to the introduction of the evidence upon the ground that it is incompetent and irrelevant and immaterial, and we might just as well point out to the Court now as at any other time what the property is that the Mackey Wall Plaster Company covenanted to convey if this option were exercised. While all of the objections could be met by making the decree conditional upon the execution of proper conveyance and the giving of proper title, for the court to decide what would be the proper title to require of the Mackey Wall Plaster Company, it is necessary to read the covenants. In the original agreement, which is Plaintiff's Exhibit One, the description of the property is as follows: "The follow-

(Testimony of O. M. Knode.)

ing described real estate and mining property, situated in the County of Cascade, State of Montana, to wit: All the right, title, interest and estate of said Plaster Company in and to those tracts of land near the town or village of Riceville, in said County, which are described as follows, The Southeast Quarter of the Southwest Quarter of Section Twenty-four," which is one of the tracts of land attacked, the east half of the northwest quarter and the northwest quarter of the southeast quarter of section twenty-five, township seventeen north, range six east," etc., and, "all the right, [146] title, and interest and estate of said Plaster Company in and to the southwest quarter of said section fourteen," which is the first piece of real estate attacked, title of it is attacked, the same being all of the rights in and title to said several tracts which were acquired by said Plaster Company by and through the conveyance to it of said property by the parties of the second part,—that is, A. D. Mackey and Myra Post Mackey, by a deed bearing date the 16th day of October, 1908, which is of record in the office of the County Clerk and Recorder of Cascade County, Montana, in Book 53, page 332; the certified copy of that deed has been introduced as one of the plaintiff's exhibits. That is the property described in the option.

The option is as follows: "And said Plaster Company, for the considerations hereinbefore recited, does hereby give and grant to said gypsum company, irrevocably, the right and option to purchase of said plaster company, at any time before the expiration

(Testimony of O. M. Knode.)

of said one year term, or, if said one year terms shall be renewed or extended for said five year term, then, at any time before the expiration of said five year term, all the property and property rights therein described, for the sum of fifty thousand dollars," etc.; then, setting forth the terms of the option; "And simultaneously with the making of said cash payment and the execution and delivery of said notes, as herein provided, the said Plaster Company will sell to the said Gypsum Company and convey to it all of the said property and property rights of said Plaster Company by a good and sufficient warranty deed, then to be executed and delivered by said Plaster Company to said Gypsum Company, covenanting therein especially that previous to the time of the execution of the said warranty deed, the said Plaster Company has not conveyed any estate or interest in said property or created [147] therein any property rights in favor of any person other than said Bypsum Company, that said property and property rights are, at the time of the execution and delivery of said deed, free from incumbrances done, made or suffered by or through the act of said Plaster Company or any person claiming under it; and that said Gypsum Company shall enjoy said property and property rights without any lawful disturbance by any person or persons whomsoever."

Now, it will be remembered that at the time this lease was made, the property was taken over, the possession of it was taken over by the Gypsum Company and that they were expressly given the right,

(Testimony of O. M. Knode.)

that Company, to pay the taxes, and, therefore, keep the premises free from the lien. Tax sales are referred to in these objections, if they happened before the time of the execution and delivery, there is no showing that that was caused by any act of the Plaster Company, if afterwards, it lay in the power of the Gypsum Company at any time, under the terms of this agreement, to free the property from any delinquent taxes.

As to the lease, the property conveyed is this: "All of the right, title, interest and estate of the said Plaster Company in and to that certain tract of land in and near the city of Great Falls, in said County of Cascade, which is described as follows,"—there giving a description by metes and bounds of the particular tract of land,—“Being all of the rights in and title to said tract of land, which were acquired by said Plaster Company, and through the indenture of lease therefor, which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22d day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which [148] said Indenture of Lease is hereby attached as part of this Instrument and marked “Exhibit Plant Lease.” That lease was turned over to the United States Gypsum Company at the date of the execution of this Agreement and the property has ever since been in their possession under the paramount title of that lease. This first contract provides that the Gypsum Company shall pay the installments of rentals as they be-

(Testimony of O. M. Knode.)

come due under that lease. Then the Conveyance recites just what this description recites, that is, "all the right, title and interest under and by virtue of that lease, all the rights of the Gypsum Company which have been for the last six or seven years—of the Plaster Company, which has been in the Gypsum Company for the last six or seven years will continue throughout the term of that lease, which has, I believe, another year to run. If, however, an assignment of that lease could be asked for in equity and it would seem best to the Court that an assignment should be made, a decree should be made conditional on the obtaining of that from the Great Northern Railway, the assignment of that lease, during the existence of the term. It would seem now the said lease, or assignment under that lease, is sufficient for all purposes, as it has been before. The deed which is in evidence and tendered is in terms exactly as what is called for under this contract and we, therefore, object to the introduction of any evidence attacking the title of the premises or any part, unless it is shown that such defects or objections come within the terms of the original agreement.

By the COURT.—Well, we will receive the evidence, and, if it is not competent, in view of the agreement, why, it will be given no weight, at this time the objection will be overruled and extension noted. [149]

By Mr. MACLEISH.—Shall I read into the record those parts of the abstract—

By Mr. HOOVER.—Might put the abstract in.

(Testimony of A. D. Mackey.)

By Mr. MACLEISH.—I will offer in evidence the abstract as Defendant's Exhibit "I." As I take it, the question of the Hubbard Abstract Company being a certified company under the laws is waived?

By Mr. HOOVER.—Yes, sir.

(The defendant rests.)

REBUTTAL.

Testimony of A. D. Mackey, for Plaintiff (Recalled in Rebuttal.)

A. D. MACKEY, recalled as witness in behalf of plaintiff in rebuttal, testified as follows:

Direct Examination.

(By Mr. COOPER.)

I came to Great Falls soon after I had met Mr. Knode in Chicago. I consulted an attorney about the situation I was in. I showed my attorney the letter of April 19th.

Q. What did you tell him with respect, if anything—what did you tell your attorney?

By Mr. MACLEISH.—I object to that question, if the Court please, conversation between Mr. Mackey and his attorney not in the presence of the defendant.

By the COURT.—Objection sustained.

There is nothing further that I wish to state concerning which the testimony of Mr. Knode and Mr. Nold has [150] refreshed my memory.

(Witness excused.)

(Plaintiff rests.)

It was thereupon agreed by the solicitors of the respective parties, with the consent of the Court, that verbal argument to the Court be waived and that the case be submitted to the Court on brief. It was further agreed that the brief on behalf of defendant be first submitted. It was further agreed that for the purpose of shortening the record that certain exhibits introduced in evidence may be omitted from a transcript of the testimony for the reason that the same are set forth in the pleading as follows: Exhibit No. 1 of plaintiff is the same as exhibit "A" attached to the answer of defendant; exhibit No. 2 of plaintiff is the same as exhibit "B" attached to the complaint of plaintiff; exhibit No. 3 of plaintiff is the same as exhibit "A" attached to the complaint of plaintiff; exhibit No. 4, the letter of April 19, 1916, is the same as exhibit "C" attached to the complaint.

Thereafter and within the time provided for by stipulation the solicitors of the respective parties filed their briefs with the Court and the Court being fully informed in the premises on July 27th, 1917, made and filed herein its decision of which decision the solicitors of the respective parties were duly informed.

On Aug. 8th, 1917, the solicitors of the plaintiff made, served upon the solicitors of defendant and filed herein notice as follows:

You and each of you will please take notice that the plaintiff above-named has obtained the consent of the Great Northern Railway Company to an assignment of the lease mentioned in the complaint in

the above-entitled action, which consent is hereto [151] attached and herewith deposited in court pursuant to the decision of the Judge of the above-named court filed July 27, 1917; and that plaintiff is in all else ready and able to perform the terms and covenants in said agreement contained, and has complied with all the conditions required of it by said decision. And

YOU ARE FURTHER NOTIFIED

that upon Tuesday, the 4th day of September, A. D. 1917, at 10:00 o'clock A. M., or as soon thereafter as counsel can be heard, at the courtroom of this Honorable Court, at Great Falls, Montana, we will present to the Court for signature the decree in the above-entitled action, a copy of which is hereto attached, when and where any objections to the granting of said decree, if any, may be submitted for determination by you or any of you.

Dated this 8 day of August, A. D. 1917.

On August 31, 1917, the solicitors of defendant gave, served upon the solicitors for plaintiff and filed notice as follows:

You and each of you will hereby take notice and be informed that at the courtroom of the United States District Court at Great Falls, Montana, on the 4th day of September, 1917, on the opening of court on said day, which according to practice is at the hour of ten o'clock in the forenoon, the above-named defendant will move the above-entitled court for rendition of a decree in the above-entitled cause in favor of the plaintiff. This motion will be made

and passed upon on the papers, records, files and minutes of court in said cause.

Dated this 31st day of August, 1917.

On Sept. 4th, 1917, before the above-entitled court at Great Falls, Montana, this matter came on for further hearing, the solicitors for the respective parties being present in court.

Mr. HOOVER, for Plaintiff.—This the time set in the notice for presenting the decree for signature, a copy of which has been [152] served. The consent of the Great Northern Railway Company is attached to the original notice which has been filed.

The notice referred to by counsel was and is in the following words:

The Great Northern Railway Company, the lessor in that certain lease entered into between it as lessor and the Mackey Wall Plaster Company, as lessee, on the 22d day of June, 1908, in and by which the said lessor did lease to said lessee certain property near its right of way in the city of Great Falls, county of Cascade, and State of Montana, does hereby consent to the subleasing of said premises by W. W. B. said lessee to the United States Gypsum C. H. B. Company, its successors and assigns, and does likewise consent to the granting by said Mackey Wall Plaster Company to said Gypsum Company of an option to purchase all the rights of said Mackey Wall Plaster Company under and by virtue of said lease first above mentioned and to the assignment of said least first above mentioned by said Mackey Wall Plaster Company to said Gypsum Com-

pany, its successors and assigns, if the same shall be purchased pursuant to said option.

GREAT NORTHERN RAILWAY COMPANY.

By R. I. FARRINGTON,
Its 2d Vice-President.

Thereupon the solicitors for the defendant presented to the Court and filed motion in behalf of defendant for a decree in said cause in words as follows:

Motion of Defendant for Decree.

Now comes the United States Gypsum Company, a corporation defendant in the above-entitled cause, and moves the Court to deny the motion of the plaintiff herein for a decree in said cause, and to enter a decree for the defendant in said cause for the following reasons:

1. For the reasons presented to this Court upon the trial and argument of said cause, and in the written briefs filed herein on behalf of the said defendant to the effect:

(a) That the equities are with the defendant; [153]

(b) That the letter of April 19, 1916, to A. D. Mackey introduced in evidence herein was a sufficient notice in writing of the intention of the United States Gypsum Company not to purchase the property of The Mackey Wall Plaster Company;

(c) That the conduct of A. D. Mackey at the meeting of April 28, 1916, and the negotiations

thereat entered into between the parties for a new lease were inconsistent with the requirement for notice, that the United States Gypsum Company would not purchase the properties of The Mackey Wall Plaster Company, and operated as a waiver of any such notice and an estoppel upon The Mackey Wall Plaster Company to claim that it was entitled to any such notice;

(d) That the Mackey Wall Plaster Company received notice of the intention of the United States Gypsum Company not to purchase the property of The Mackey Wall Plaster Company by the letter of May 11, 1916, which was a substantial compliance with the terms of the contract under the circumstances as they then existed;

(e) That the contract of June 15, 1909 cannot be specifically enforced in equity at the suit of either the plaintiff or the defendant and the bill must therefore be dismissed; and

(f) That the plaintiff had failed to deliver to the defendant, or to introduce in evidence herein, the written consent of The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company, and that it was too late for the plaintiff to deliver said consent; [154] all of which said reasons were supported by the arguments and authorities heretofore presented to this court.

2. The instrument deposited by the plaintiff herein purporting to be the written consent of The

Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company has not been properly identified or proved, and the defendant denies that the same was executed or delivered by the said The Great Northern Railway Company, or upon its behalf.

3. The plaintiff has not procured or delivered to the defendant the written consent of The Great Northern Railway Company to an assignment of the lease of June 22d, 1908, to the United States Gypsum Company, nor has it at any time heretofore tendered to the United States Gypsum Company any such written consent.

4. The said instrument purporting to be the written consent of said The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company was not delivered to this defendant within the time that the said plaintiff was required to perform its contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively.

5. The said instrument purporting to be the written consent of said The Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company does not purport to be supported by any consideration, and there was no consideration for said instrument.

6. At the time the said plaintiff filed its bill of complaint herein it had no cause of action against this defendant because:

(a) It had not procured or delivered to
[155] this defendant the written consent of

The Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company; and

(b) It had no right to convey or assign said lease of June 22, 1908, to the said United States Gypsum Company;

and it therefore follows that said suit was by the said plaintiff prematurely brought.

7. The said paper purporting to be the written consent of The Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company is insufficient in form because:

(a) It is not properly executed on behalf of The Great Northern Railway Company in that the authority of the person signing the same does not appear, nor does it appear that the execution and delivery of said instrument was authorized by the Board of Directors of said Railway Company, nor does it bear the corporate seal of the said The Great Northern Railway Company;

(b) It is not signed by the President or Secretary of the said corporation, The Great Northern Railway Company, nor is it acknowledged so as to entitle the same to record in accordance with the statutes of the State of Montana in such cases made and provided;

(c) It bears no date and it does not purport to be duly authorized by said The Great Northern Railway Company, a corporation;

and for these reasons the defendant says that the said instrument is insufficient in form to bind the said The Great Northern Railway Company or to constitute a sufficient consent to this defendant to an assignment of said lease by the said plaintiff. [156]

8. The indenture dated July 5th, 1916, and purporting to grant, bargain, sell, convey and confirm unto the United States Gypsum Company the premises described in said lease of June 22, 1908, does not purport to assign to the said United States Gypsum Company said lease of June 22, 1908, nor has the said plaintiff at any time heretofore tendered to the said United States Gypsum Company an assignment of said lease accompanied with the written consent of The Great Northern Railway Company to an assignment of said lease to the United States Gypsum Company, nor is said last-mentioned indenture dated July 5, 1916, accompanied by any such assignment, and it is now too late for the said plaintiff to tender the said last mentioned indenture or to tender an assignment of the said lease of June 22, 1908, to the United States Gypsum Company.

The defendant THEREFORE PRAYS that the motion of plaintiff for a decree in this case be denied, and that a decree be entered herein for the defendant.

Dated 4th day of September, A. D. 1917.

NORRIS & HURD,
SCOTT, BANCROFT, MARTIN, STEPHENS,
Solicitors for said Defendant.
(Duly verified by Mr. MacLeish.)

After argument of counsel the Court made the following statement and ruling: "I will take these papers and do something with it during the course of the day. I will not send a decree stating that you have obtained such consent because this document does not prove itself."

Mr. MACLEISH.—I should also like to call your Honor's attention, if your Honor intends to take the matter under advisement, that this decree provides for eight per cent interest from July 6, 1916, on the first \$15,000.00, and then interest on the notes from that same date,—the date of payment. I should like to call your Honor's attention to the fact that at no time, even up to the present time, could the defendant have safely taken [157] possession of that property, and until plaintiff has performed there should be no interest charged against the defendant of any kind.

I assume whatever your Honor does, we may have our proper objections and exceptions placed on record.

THE COURT.—"That is to be considered. There are two phases to that case. As I say, again,—I don't know, I haven't read this notice, whether it makes it appear that they had the consent and could have given you a deed at the time performance was due, if you had called for it and raised that particular objection, which of course you don't do."

During the day of Sept. 4, 1917, the Court made an order deferring the making of decrees herein for a period of thirty days and made memorandum thereof.

On October 3, 1917, at Missoula, Montana, this matter came on for further hearing before the Court, Mr. Hoover appearing as solicitor for plaintiff and Mr. Hurd, solicitor for defendant.

**Motion of Defendant for Suppression of Deposition
of R. I. Farrington et al.**

Defendant moved that the depositions of R. I. Farrington and L. E. Katzenbach heretofore taken at St. Paul, Minnesota, on September 25, 1917, in behalf of plaintiff be suppressed for the reasons stated in the motion of defendant which is as follows:

“Comes now the defendant, United States Gypsum Company, and moves the Court for an order suppressing the depositions of R. I. Farrington and L. E. Datzenbach heretofore taken by the plaintiff herein on the 25th day of August, 1917, at the city of St. Paul, State of Minnesota, on the ground and for the reason that said depositions and each of them were taken after the expiration of a period of [158] sixty days from the date whereon the above-entitled case was put at issue, and that said depositions were not taken in conformity with and pursuant to any of the provisions of the federal statutes or any of the provisions of the equity rules and taken in violation of rule forty-seven of the equity rules of practice.

This motion is based upon all the records, papers, files and minutes of court in said cause.

Dated this 3d day of October, 1917.”

The COURT.—I will hear the depositions and if later it is found that they should not be admitted,

they will, of course, be considered.

Thereupon plaintiff offered the deposition of R. I. Farrington as follows:

Deposition of Robert I. Farrington, for Plaintiff.

My name is Robert I. Farrington. I am of the age of fifty-six years and a dealer in investment securities. I was a director and second vice-president of the Great Northern Railway Company throughout the month of June, 1909. I was elected a director of that company April 20th, 1901, and served continuously until May 27th, 1912. I was elected second vice-president December 30, 1901, when the company by its by-laws ceased to number the titles of vice-president, and thereafter I served as vice-president until December 31, 1912.

Q. As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?

Mr. HURD.—Defendant objects to this question on the ground that the testimony sought to be elicited by said question is incompetent for the purpose for which it is offered, that is to say, to prove the authority of the witness and that [159] such evidence is not the best evidence and no foundation is laid for it.

The COURT.—It appears that this objection was not made at the time the deposition was taken. I will hear the answer and if it appears the evidence is not admissible it will not be considered.

(Deposition of Robert I. Farrington.)

A. I had authority to sign such contracts and instruments.

Plaintiff's Exhibit "A" (consent of Railway Company set out at length on page 76) was handed to witness and he stated that I signed that instrument and that in signing same as second vice-president I was acting for the Great Northern Railway Company.

Q. Were instruments of this nature when so signed by you recognized by the corporation as valid acts?

Objected to by defendant upon the grounds last above stated that the same ruling of the Court was had thereon.

A. They were.

The first initials "W. W. B" upon the margin and upper left-hand corner of the exhibit "A" mentioned are those of W. W. Broughton who at the time was traffic manager of the Great Northern Railway Company, and the initials "C. H. B." are those of Charles H. Babcock who, I think, was the company's land commissioner at that time. The purpose of those initials were to indicate to me that in the opinion of those persons the instrument was a proper one for me to execute.

Deposition of L. E. Katzenbach, for Plaintiff.

The deposition of L. E. KATZENBACH was then read to the Court and is as follows:

My name is L. E. Katzenbach. I am thirty-seven years of age and I am secretary and treasurer of the

(Deposition of L. E. Katzenbach.)

Great Northern [160] Railway Company. I have been secretary since 1912. As such officer I have the custody of the corporate records of the company and the custody of the minute-book of the company. I have the minute-book of the meeting showing the election of R. I. Farrington to the office of director and to the office of vice-president of the Great Northern Railway Company. Witness produced a book which is volume two of the minutes of the stockholders and directors of the Great Northern Railway Company and read from the record the action taken by the board of directors of the Great Northern Railway Company on April 20th, 1901.

Q. Read the part with reference to the election of Mr. Farrington.

Objected to by Mr. Hurd for the reasons: First, that the testimony sought to be elicited by the question is not competent for any purpose; second, that it is not the best evidence; third, that there is no foundation for it, in that, the proper records of the Great Northern Railway Company are not shown to have been correctly kept and in that they have not been identified and defendant objects to all questions of similar purport and to all evidence of similar character on the grounds and for the reasons stated in such objection.

The COURT.—It appears this objection was not made at the time the deposition was taken. The same ruling.

A. On motion of Mr. James N. Hill, Mr. Robert I. Farrington was then elected a member of this board

(Deposition of L. E. Katzenbach.)

of directors of this company to fill the vacancy caused by Mr. Rod's resignation.

The minutes are properly attested by E. Sawyer, then assistant secretary of the company. This is the official and original record of the corporate action of the Great Northern [161] Railway Company. I know of no other record. I have checked through the minutes showing the re-election of Mr. Farrington as director from time to time and he continued as director of the company until May 27th, 1912. He was re-elected director October 11, 1906. All records of the company to which I have testified are properly attested and are the original meetings of stockholders of the company. I have the records of the corporation showing the election of Mr. Farrington as vice-president. (Witness produced them.) Mr. Robert I. Farrington was elected second vice-president of the company by the board of directors of the Great Northern Railway Company December 30, 1901. These are the original minutes and were attested by E. Sawyer, assistant secretary. The records show that Mr. Farrington was continuously in the office of second vice-president from December 30, 1901, to October 15, 1909. Thereafter and until in December, 1912, he was vice-president of the company. The minutes show that for the period including June, 1909, that Mr. Farrington was elected second vice-president of the company. These minutes are attested by E. Sawyer, assistant secretary, and the meeting was held on October 8, 1908. I have the by-laws of the company for throughout the

period when Mr. Farrington was an officer and director of the company. The provisions of the by-laws applicable to his duties are as follows:

Article VIII of the by-laws of the Company approved by the Board of Directors on July 24, 1896, reads as follows: "In addition to the officers prescribed and required by the charter of this Company, there may be a Second Vice-President and a Third Vice-President, who shall be elected by the Board of Directors in the same manner as is provided in Article I of these by-laws for the election of [162] Secretary and Treasurer, and who shall hold his office at the pleasure of the Board.

"The Board of Directors may invest the respective officers provided for in this Article with such powers and authority, and charge them respectively with such duties, not inconsistent with the charter of the Company nor with the laws of this State, as it shall deem proper and necessary in the due and orderly conduct and management of the business and affairs of the Company; and it will, by resolution, establish and clearly prescribe and define such powers, authority, and duties, and said officers will have, possess, and exercise all the authority and powers, and be charged with all the duties, thus established, defined and prescribed."

At a meeting of the Board of Directors held on October 27, 1903, Article III of the by-laws of the Company approved by the Board of Directors on July 24, 1896, above mentioned, was amended to read as follows:

“Article III.

“The President and Vice-President.

“Section 1. The President, or in his absence, the ranking Vice-President in attendance, who is also a director, shall preside at all meetings, either of the Board of Directors, or of the stockholders.

“In the absence from any meeting of the stockholders or Board, of the President and of all the Vice-Presidents who are directors, the stockholders or directors, as the case may be, may appoint a President *pro tempore*.

“Section 2. The President will have and exercise general supervision and control over the entire property, business and affairs of the Company.

“All the officers and agents of the corporation [163] will be responsible to him for the proper and faithful discharge of their several duties, and will obey such orders and make such reports to him touching the business of the Company under respective charge as he may from time to time direct; and any Superintendent, engineer, agent or employee of the Company may be suspended or discharged by him, if in his judgment there be cause for such suspension or discharge, at any time when the Board of Directors shall not be in session.

“All stock certificates and bonds, all leases, deeds and other instruments affecting the right of way, or other real property of the Company, all contracts with other railway companies relating to the use of railways or other real property with either party, and all other instruments having, or requiring to

(Deposition of L. E. Katzenbach.)

have, the Company's corporate seal affixed thereto, shall, to be valid, be signed by the President, or one of the Vice-Presidents who is also a director, or by one of the Vice-Presidents who is not also a director when especially authorized to do so by resolution of the Board, or by an Assistant to the President, when in like manner authorized to do so.

"The several Vice-Presidents shall perform such other duties as from time to time shall be directed by the President of the Board."

The quotations given are from the corporate records and the minutes of the Company. The minutes are duly attested. I have given the by-laws which affect the duties and authority of the second vice-president who was also a director during the time when Mr. Farrington was an officer of the Company. The removal of the word "second" from the title of Mr. Farrington as second vice-president did not in any way change his duties or authority as an officer of the company. I have [164] read all of the by-laws relative to the duties of Mr. Farrington as an officer and director of the company during the period he was in office. I know W. W. Broughton whose initials are placed upon exhibit "A" (the consent above mentioned). I do not know when Mr. Broughton left the employ of the company but I think it was in 1910 or 1911. It was before I severed my connection with the company, that is to say, prior to January, 1912. I do not know when Charles H. Babcock left the company but that was before my employment in the service of the company ceased.

(Deposition of L. E. Katzenbach.)

All the minutes from which I have read are contained in the official minute-book of the company. It is a part of my duties as secretary and treasurer of the company to have the custody and control of these books. The minutes of all the meetings referred to are attested by the secretary or the assistant secretary of the company. The minutes of the meeting of October 11, 1906, are attested by N. Terhune, assistant secretary. The minutes of the meeting of October 7, 1903, are attested by E. Sawyer, assistant secretary. I have appeared here pursuant to a subpoena *duces tecum*.

Cross-examination.

(By Mr. MACLEISH.)

Without waiver of objections made at the commencement of the taking of this deposition.

I have no personal knowledge of the records referred to by me consisting of resolutions and by-laws preceding the date of my employment. There are other by-laws of the corporation and amendments thereto touching the duties and authorities of vice-presidents which have not been read by me.

Q. Will you attach to your deposition the original of the by-laws of the corporation and the amendments thereto? Or hand them to the notary so that he may attach them? [165]

A. No, I won't.

Q. Will you attach to your deposition the original stockholders' resolutions and the original directors' resolutions, portions of which you have read in your direct examination? Or hand the same to the notary

(Deposition of L. E. Katzenbach.)

so that he may attach them? A. No.

The Great Northern Railway Company is incorporated under the laws of Minnesota.

Redirect Examination.

(By Mr. HOOVER.)

I am willing to read the entire original by-laws and entire original minutes of the stockholders and directors' meeting from which I have heretofore read parts and allow copies of such entire documents to be attached to my deposition.

Deposition of R. J. Reynolds, for Plaintiff.

R. J. REYNOLDS, a witness in behalf of plaintiff was called, duly sworn and testified in behalf of plaintiff as follows:

Mr. HURD.—To the evidence of the witness R. J. Reynolds the defendant objects on the ground and for the reason that there is no authority for the taking of said testimony because: First, the order and notice of the hearing to be held at this time does not specify that oral evidence will be offered; secondly, said defendant not having notice that any further testimony would be offered except that contained in the depositions is not prepared to meet such evidence.

The COURT.—The evidence will be admitted and if you are taken by surprise the Court will give you an opportunity [166] to present other evidence.

My name is R. J. Reynolds; I am an attorney at Great Falls, Montana. In the months of May and June, 1919, I was clerk in the legal department of the Great Northern Railway Company in the office

(Deposition of R. J. Reynolds.)

of Veazey & Veazey at Great Falls, Montana. They were division counsel for said Railway Company for the state of Montana and were at that time attorneys for the United States Gypsum Company in the matter of preparing lease and option between the Gypsum Company and the Mackey Wall Plaster Company, dated June 15, 1909. I am able to identify the instrument marked Plaintiff's Exhibit "A" (consent above referred to) attached to the deposition of R. I. Farrington. At the dictation of Mr. I. Parker Veazey, Sr., I prepared that consent.

**Plaintiff's Exhibit "X" — Letter, June 8, 1909,
Veazie & Veazie to Broughton, General Traffic
Manager.**

File 320.

June 8th, 1909.

Mr. W. W. Broughton,
General Traffic Manager,
St. Paul, Minn.

Dear Sir:

Referring to the subject discussed in your letter of May 28th, addressed to Mr. Kenney, with which you enclosed copy of letter addressed to you, under the date of May 26th, by Mr. S. L. Avery, President U. S. Gypsum Company, and copy of your reply (which said correspondence you asked to have brought to my attention, through Mr. Jackson) we herewith enclose written consent by the Railway Company to the sub-leasing and subsequent assignment of the lease from the Railway Company to the

(Deposition of R. J. Reynolds.)

Plaster Company, and would ask that you kindly have this paper immediately executed on behalf '[167]' of the Railway Company, and forward to Mr. S. L. Avery at Chicago, advising us of your having done so and, as Mr. Mackey may feel that he should have a similar instrument in the files of his company, we send the consent in duplicate and would ask if agreeable, you will have each of these instruments signed on behalf of the Railway Company and the other sent to the Mackey Wall Plaster Company at Great Falls.

Yours sincerely,

VEAZEY & VEAZEY,

IPV. R.

Q. State the circumstances under which it was prepared.

Mr. HURD.—To which question the defendant objects for the reason that it calls for a disclosure of privileged communication between attorney and client; that said evidence is not competent for any purpose and there is no foundation laid for it; and defendant objects to this entire line of testimony on the grounds stated in the last objection.

WITNESS.—I mailed the original and duplicate of the consent to Mr. W. W. Broughton, General Traffic Manager of the Great Northern Railway Company at St. Paul, Minnesota. Plaintiff's proposed Exhibit "X," which you hand me is an exact carbon copy of the letter with which the original and duplicate copy of the consent were inclosed. I wrote

(Deposition of R. J. Reynolds.)

that letter at the dictation of Mr. I. Parker Veazey, Sr., Mr. Veazey, Sr. signed the letter and I mailed it on June 8th, 1909. Whereupon, plaintiff's said proposed Exhibit "X" was offered in evidence.

I am able to identify plaintiff's proposed Exhibit "Y"; that is a letter received by Messrs. Veazey & Veazey from Mr. Broughton's office; it was received prior—probably a day or two—to the execution of the lease and option between the Mackey Wall Plaster Company and the United States Gypsum Company. [168] I received it from the mail and placed it upon Mr. I. Parker Veazey's table sometime during the day of its receipt. With the letter at the time it was received was enclosed the consent, Plaintiff's Exhibit "A." Whereupon said letter was offered in evidence as Plaintiff's Exhibit "Y."

**Plaintiff's Exhibit "Y"—Letter, June 12, 1909,
Broughton to Veazie & Veazie.**

GREAT NORTHERN RAILWAY COMPANY.

W. W. BROUGHTON,

General Traffic Manager.

St. Paul, Minn. June 12, 1909.

Veazey & Veazey,

Attorneys, Great Falls, Mont.

Dear Sirs:

Referring to your letter of the 8th, file 320, enclosing consent of the railway company to the subleasing and subsequent assignment of lease from the railway company to the U. S. Gypsum Company.

I enclose, herewith, copy of this document duly

(Deposition of J. R. Reynolds.)

executed by the Great Northern Railway and have sent the other copy of the same to Mr. Avery, President of the Gypsum Company, at Chicago.

Yours truly,
W. W. BROUGHTON.

Cross-examination.

(By Mr. HURD.)

Messrs. Veazey & Veazey at that time were the attorneys for the United States Gypsum Company and were attorneys of that Company at the time the lease marked Plaintiff's Exhibit "X" was written.

Mr. HURD.—Defendant moves to strike all of the [169] testimony of witness R. J. Reynolds from the record upon the ground and for the reason that it discloses privileged communications between client and attorney and that no foundation for the testimony has been laid.

The COURT.—Same ruling as the first.

Deposition of W. H. Hoover, for Plaintiff.

W. H. HOOVER, a witness for plaintiff was called, sworn and testified as follows:

Mr. HURD.—Defendant objects to any testimony of the witness on the ground and for the same reasons stated to the testimony of Mr. Reynolds.

WITNESS.—My name is W. H. Hoover; I am an attorney at law, residing at Great Falls, Montana, and one of the attorneys for the plaintiff. Within three or four days after notice of the Court's findings of August 27th, 1917, I called at the office of Veazey

(Deposition of W. H. Hoover.)

& Veazey, attorneys for the Great Northern Railway Company at Great Falls, Montana. I then had a conversation with Mr. I. Parker Veazey, Jr., one of the members of the firm for the purpose of ascertaining whether the consent of the assignment of the lease in controversy had been given by the Great Northern Railway Company. After a conversation with Mr. Veazey, he went to his private files and produced a file concerning the matter between the United States Gypsum Company and the Mackey Wall Plaster Company. He produced from the file and handed to me the consent, Plaintiff's Exhibit "A," which is attached to Mr. Farrington's deposition, and stated that the consent had been given long prior to this time for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it. The consent was pinned to the letter of Mr. W. W. Broughton, which has been introduced as Plaintiff's Exhibit "Y." I took the consent away with me. He later handed to me the two letters, Plaintiff's Exhibits "X" [170] and "Y" for the purpose of identifying the instruments. I later received a letter from the office of Mr. E. C. Lindley, Vice-president and General Counsel for the Great Northern Railway Company dated August 22d, 1917, which reads as follows, which I offer in evidence as Plaintiff's Exhibit "Z."

To which defendant objected upon the ground that the same was incompetent, irrelevant and that he had no authority to acquiesce in the consent theretofore given.

(Deposition of W. H. Hoover.)

Mr. HOOVER.—The plaintiff has heretofore tendered certain deeds and instruments to show compliance with its obligations under the contract. If there are any objections to the form or sufficiency of these instruments we would like to have it determined at this time so as to prevent delay.

Mr. HURD.—So far as I know the deeds are sufficient. At least I know of no objection upon that ground.

The plaintiff rested and Mr. Hurd for defendant stated that the defendant had no further testimony to offer. The court thereupon ordered decree in favor of plaintiff. By stipulation of counsel and with the consent of the Court the defendant was given until December 10th within which to prepare and file its bill of exceptions herein.

The foregoing is presented as a statement of the evidence taken on the trial of said cause.

SCOTT, BANCROFT, MARTIN &
STEPHENS and
NORRIS & HURD,
By EDWIN L. NORRIS,

Solicitors for Defendant.

Service of the above statement and receipt of a copy [171] thereof are hereby acknowledged and we hereby consent that the same be settled as a statement of the evidence in said cause.

Dated this 3rd day of December, 1917.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Order Approving Statement of Evidence.

The foregoing statement of the evidence contains all of the testimony, oral and documentary, introduced at the trial of said cause and is approved this the 3d day of December, 1917.

GEO. M. BOURQUIN,

Judge of the Above-entitled Court.

Filed Dec. 3d, 1917. Geo. W. Sproule, Clerk.
[172]

That, on October 16, 1916, an order and opinion of the Court was duly filed herein, in the words and figures following, to wit:

*In the United States District Court, in and for the
District of Montana.*

THE MACKEY WALL PLASTER COMPANY
et al.,

Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY,
Defendant.

Memorandum Opinion.

Herein, the motion to dismiss the suit is denied as to the plaintiff corporation and granted as to the individual plaintiffs.

MEMO.

The complaint contains two separate causes of action, with no joint interest in plaintiffs.

Defendant's single motion is bad as to the plaintiff corporation, but plaintiffs, assert nothing by reason of it, and consent to dismissal as to the individual plaintiffs.

Filed October 16th, 1916. Geo. W. Sproule, Clerk.
[173]

That, on July 27th, 1917, opinion of the Court was duly filed herein in the words and figures following, to wit: [174]

*In the District Court of the United States for the
District of Montana.*

No. 78.

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Opinion.

SPECIFIC PERFORMANCE.

It appears that by indenture plaintiff leased to defendant, all the former's "right, title, estate and interest," in and to certain mining and other property, the latter in part land plaintiff enjoyed under lease from a railway company subject to the usual condition of nonassignment and forfeiture for condition broken and of which defendant had notice.

The indenture contained an option to defendant to purchase during the term, and was twice renewed, the last renewal for one year. As additional consideration for the last renewal, defendant agreed that if it determined it would not exercise the option, it would timely give to plaintiff written notice "to the effect that lessee will not purchase," neglect or failure to give such notice obligating it to purchase. Defendant enjoyed the premises seven years, the term ending July 6th, 1916, notice of nonpurchase could be given at any time between July 6th, 1915 and May 3, 1916.

Plaintiff alleges defendant failed to give such notice, that plaintiff offered to perform, that defendant refused performance; and plaintiff offers to do equity. Defendant denies said failure to give notice and pleads waiver and estoppel in respect to notice, and that plaintiff cannot convey a good title nor any in respect to the railway [175] lease.

April 19th, 1916 defendant wrote plaintiff as follows:

[See Ex. 5—page 94.]

April 28th, 1916, a conference followed in defendant's office, between Mackey, plaintiff's president, and Knode, defendant's vice-president and manager, Nold defendant's superintendent, present. The evidence of this conference is as unsatisfactory as usual when oral passages solely between interested parties are relied upon by one of them to escape the obligation of a written contract by which he is otherwise bound, the other party resisting.

Defendant's, is the testimony of Knode and Nold,

in substance that they told Mackey conditions were adverse and that [176] defendant had decided not to purchase the property; that Mackey declared he would operate the property, then asked what defendant would do if it would not purchase; that Knode responded he would favor continuing the lease, whereupon Mackey requested such proposition be put in writing and sent to him, which Knode promised. Plaintiff's, is the testimony of Mackey, in substance that conditions were discussed; that Knode said that on May 4th or 5th defendant would send Mackey formal notice defendant would not purchase; that later, Knode said he would favor continuing the lease; and that Mackey responded that whatever defendant decided to do, to send to him at Great Falls.

May 11th, 1916, Knode wrote to Mackey, somewhat elaborately reciting that on April 19 he had written Mackey defendant would not purchase, that at the conference he had advised Mackey of defendant's decision not to purchase, that he wished to say defendant is unwilling to purchase the property, and briefly concluding defendant is willing to extend lease and option for an indefinite determinable term. May 12, 1916, and before receiving said letter, Mackey wrote defendant, assuming it had elected to purchase by failure to give notice otherwise. These and later letters seem obvious efforts to create self-serving documents.

The letter of April 19, is not notice to the effect the lessee would not purchase. Notice of rejection of an irrevocable offer, like notice of acceptance of

an offer, must be unequivocal and unambiguous. The reason and object are the same in both, viz., so that both parties are bound or both free, or neither is; so that subsequently neither can escape obligation of the contract or impose its obligation on the other, by belated construction of doubtful language. All doubts are resolved against the writer. The said letter is inconclusive. No prudent vendor would rely upon it and dispose of the property to another. The conditions the letter referred to the judgment of the writer might change. Men do not always [177] conform to future necessity. To say the writer expects to give formal notice of refusal to purchase, deprives the letter of all quality of the required notice, looks to the future, and advises that the writer has reason to consider it likely such notice will be given. It appears but tentative and for negotiation prior to the vital time, the day of decision. If it be conceded that this letter and defendants' version of the conference, if proven, make out the defense of waiver and estoppel, the proof fails.

He who alleges waiver and estoppel must clearly and satisfactorily prove all the necessary facts and elements. Mindful defendant's testimony is of two witnesses and plaintiff's, of but one, circumstances tend to establish at least equipoise between them. And so defendant has not sustained the burden of proof imposed upon it by its defense. It has not persuaded the court. Amongst the circumstances referred to is that the written contract requires written notice, that such notice was not given, the letter of April 19th looking to future notice, defendant's

business experience, common sense business methods, the responsibility of its witnesses, their embarrassment and defendant's liability.

Knodes mistake in dates and belief May 5th would suffice for notice, which mistake he admits, (Though immediately qualifiedly receding) he discovered about May 5th, when he "came to look and see," and the letter of May 11th, with its iteration and reiteration of notice as though to impress Mackey with its truth to save the situation, to escape the contract consequent upon neglect.

Mackey, too, lacked somewhat of being a satisfactory witness, but his testimony and the circumstances at least serve to defeat persuasion of waiver and estoppel, that sufficing for plaintiff's case.

The letter of May 11th, is too late. In this state time is of the essence of options upon mining property.

The contract is perhaps novel in real estate options [178] so far as the books disclose, but is analogous to sales on approval requiring notice of disapproval by a time limited. Notice failing, the sale is made or absolute. By mistake or neglect defendant failed to give notice. It agreed upon such contingency to purchase. No hardship is plead or proven, and nothing is perceived to move the discretion of a court of equity to withhold specific performance.

If are incumbrances for which plaintiff is responsible (none pointed out in a voluminous exhibit), purchase money deductions can be made in the decree. Plaintiff's offer of performance was without its railway landlord's consent to assignment of that lease.

Defendant did not base refusal to accept performance thereon, but on notice of rejection, waiver and estoppel.

Apparently when the contract was entered into, both parties contemplated either that plaintiff would secure such consent or that it was unnecessary; or defendant was willing to hazard it. Time was of the essence of defendant's rejection of purchase, but not of plaintiff's subsequent conveyance. For that, it had reasonable time.

This is not a case as defendant contends of lack of mutuality in that a stranger's (the railway lessor). consent is necessary and cannot be compelled; hence, since defendant could not have specific performance, plaintiff cannot.

It is the ordinary case of a contract to convey land which the vendor does not own—wherein he could not then perform his contract.

If able to perform when due, or at time of decree, no bad faith appearing, specific performance may be had.

Mutuality of remedy, not obligation, is alone required, and suffices if it exists at time of decree. This is now familiar law. The doctrine for which defendant contends applies where one party engages a stranger shall perform some service for the other party, and not where one party contracts to [179] convey what he does not own or but by defective title, incidentally involving that he procure a stranger to perform a service for him, the vendor, viz, convey the property to the vendor or perfect the vendor's title, so he may perform his contract with the vendee.

A contract to assign a lease involving the lessor's consent, is like in principle. Cases to the contrary are believed distinguishable or lack authority in this jurisdiction. This distinction is to be noted, however. Even if the contract be silent in respect to the landlord's consent, or though the vendee does not require it, there can be no specific performance without it. And that because a court of equity, of conscience, will not render a decree injuriously affecting parties not before it, will not render a decree for specific performance without it. And that because a court of equity, of conscience, will not render a decree injuriously affecting parties not before it, will not render a decree for specific performance which involves a party's breach of his contract with another. Otherwise would be the reverse of equity.

This court will not in effect decree the railway landlord must accept defendant as tenant for the term or invoke forfeiture of the lease. Nor will it by decree aid plaintiff to violate its covenant with its landlord. It is believed a landlord with right to determine its tenants, can have injunction to restrain assignment of such a lease.

If within thirty days plaintiff secures the railway lessor's consent to the assignment, or a discharge of the covenant, and in all else is ready and able to perform, it shall have decree as prayed. Otherwise, decree for defendant.

BOURQUIN,
Judge.

Filed July 27, 1917. Geo. W. Sproule, Clerk.
[180]

That, on September 5th, 1917, opinion of the Court was duly filed herein, in the words and figures following, to wit:

*In the District Court of the United States, in and for
the District of Montana.*

MACKEY WALL PLASTER CO. et al.,
Plaintiffs,

vs.

UNITED STATES GYPSUM COMPANY,
Defendant.

Memorandum Opinion.

Herein, decree will be deferred thirty days.

MEMO.

Assignment of the lease can be done only with the Railway's written consent. Thirty days were allowed to procure that consent. The plaintiff presents such consent, (alleged) signed by one ———, 2d V. P. Defendant objects to sufficiency.

It does not appear that ——— is the officer he represents to be, and has authority to bind the railway company,—or that the railway company acquiesces in this consent. Under the circumstances plaintiff will be allowed to supply defects, if it can, within thirty days.

Title must meet the requirements of the law of specific performance, or not decreed.

BOURQUIN, J.

Filed September 5, 1917. Geo. W. Sproule, Clerk.

That, on September 19, 1917, notice of the taking of depositions was duly served herein, being in the words and figures following to wit:

*In the District Court of the United States, in and for
the District of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Notice of Taking of Depositions.

To the Above-named Defendant and to Messrs. Norris & Hurd, and Scott, Bancroft, Martin & Stephens, Its Solicitors,

You and each of you will please take notice that we will take the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney, before Lewis D. Newman, a Notary Public, at Room 1127 Great Northern Railway Building, 175 East Fourth Street, Saint Paul, Minnesota, upon Tuesday, the 25th day of September, A. D. 1917, at ten o'clock A. M., or at a time or times thereafter to which said hearing may be postponed or continued, when and where you may appear and propound interrogatories if you so desire.

Dated this 19th day of September, A. D. 1917.

COOPER, STEPHENSON & HOOVER,
Attorneys for Plaintiff.

Service of the within notice is admitted, this 19th day of September, A. D. 1917.

NORRIS & HURD, & SCOTT, BANCROFT,
MARTIN & STEPHENS,
Attorneys for Defendant. [182]

That on September 17th, 1917, affidavit of W. H. Hoover supporting application to take depositions was duly filed herein, in the words and figures following, to wit: [183]

*In the District Court of the United States for the
District of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Affidavit of W. H. Hoover.

State of Montana,
County of Cascade,—ss.

W. H. Hoover being first duly sworn, deposes and says:

That he is one of the attorneys for the plaintiff

in the above-entitled action. That he makes this affidavit for the reason that no officer of the plaintiff corporation is within the state of Montana or county of Cascade where this affidavit is made; and for the further reason that he is personally well acquainted with the facts hereinafter particularly set forth, and is authorized to make this affidavit in behalf of plaintiff.

That pursuant to the decision in the above cause it has become necessary for plaintiff to offer proof showing that the consent of the Great Northern Railway Company to the assignment of the lease was properly authorized and given, and to make further showing pursuant to such order, and that a hearing is necessary for that purpose. [184]

That the consent tendered by the plaintiff in the above cause was executed by R. I. Farrington, as second vice-president of the Great Northern Railway Company.

That the offices of the Great Northern Railway Company, where the corporate books and records are kept, are located at Saint Paul, Minnesota. That the officers and agents of said corporation who are able to prove the said signature and *the* proper execution of said instrument reside and are now, to affiant's best knowledge, information and belief will continue to be in the city of Saint Paul in the State of Minnesota.

That G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley, and W. P. Kenney, are witnesses, by whose testimony the genuineness of

the signature upon said consent and the authority of the officer to execute the same may be proved, and they are necessary witnesses in this case.

That each of the above-named witnesses lives at a greater distance than one hundred miles from Great Falls, Montana, where the hearing is to be had and the issue aforesaid tried.

That Lewis D. Newman is a notary public residing at Saint Paul, in the state of Minnesota, and having his office and place of business where it would be convenient for the testimony of all of the abovenamed witnesses to be taken.

That this affidavit is for the purpose of supporting and to be used in connection with the application for permission to take depositions hereto attached.

W. H. HOOVER.

Subscribed and sworn to before me this 17 day
of September, A. D. 1917.

[Seal] GEO. W. SPROULE,
Clerk U. S. District Court, Dist. of Montana.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk.
[185]

That on September 17th, 1917, application for leave to take depositions was duly filed herein, in the words and figures following, to wit: [186]

*In the District Court of the United States for the
District of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Application for Permission to Take Depositions.

Comes now the plaintiff above named and applies to the Court for permission to take the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney to be used at the hearing noticed for the 3d day of October, A. D. 1917, in the above cause, as evidence in behalf of plaintiff.

COOPER, STEPHENSON & HOOVER,

Attorneys for Plaintiff.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk.

[187]

That on the 17th day of September, 1917, order permitting the taking of depositions was duly filed and entered herein in the words and figures following, to wit: [188]

*In the District Court of the United States for the
District of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Order Permitting the Taking of Depositions.

The application of the plaintiff in the above cause for permission to take depositions, having been presented to the Court, and the Court being advised.

IT IS HEREBY ORDERED

that the depositions of G. R. Martin, Charles H. Babcock, W. W. Broughton, James T. Maher, L. E. Katzenbach, R. I. Farrington, E. C. Lindley and W. P. Kenney, to be used before this court at the hearing noticed for the 3d day of October, A. D. 1917, may be taken, at any time prior to said hearing, before Lewis D. Newman, a notary public at St. Paul in the State of Minnesota; or, in case of his failure to act, then before a notary public at said place to be named in the notice of the taking of such depositions; and that notice of the time and place of

taking the said depositions must be given to the defendant or its attorneys five days previous to the time set for taking the same.

Dated this 17 day of September, A. D. 1917.

BOURQUIN,
Judge.

Filed Sept. 17, 1917. Geo. W. Sproule, Clerk.
[189]

Thereafter, on October 3d, 1917, Final Decree was duly rendered and entered herein, in the words and figures following to wit:

*In the District Court of the United States in and for
the District of Montana.*

No. 78.

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Decree.

This cause came on to be heard upon the 21st day of March, A. D. 1917, and proofs were heard and the cause submitted to the Court upon briefs of counsel; and

Thereupon upon July 27th, A. D. 1917, upon con-

sideration thereof, it was ordered, adjudged and decreed by the Court that if within thirty days plaintiff secure the consent of the Great Northern Railway Company to the assignment of the lease described in the amended complaint or a discharge of the covenant against assignment, plaintiff have its decree as prayed for. And such consent having been obtained by plaintiff and tendered in court within such time and the Court having heard proofs of its sufficiency and delivery and plaintiff having deposited in court deeds and conveyances as in said contract provided, and the Court being satisfied, it is hereby ORDERED, ADJUDGED and DECREED:

That the contract mentioned in plaintiff's amended complaint ought to be specifically enforced; and,

It is ORDERED, ADJUDGED and DECREED that defendant pay to plaintiff the sum of Fifteen Thousand Dollars (\$15,000.00) [190] with interest at eight per cent per annum from July 6th, 1916, and execute and deliver to plaintiff its seven promissory notes for \$5,000.00 each, dated July 6th, 1916, payable to the order of plaintiff and payable 3, 6, 9, 12, 15, 18 and 21 months after date respectively with interest upon each at five per cent per annum from date until paid; and it is

ORDERED that plaintiff do have and recover from defendant its costs and disbursements in this action.

Given and made this 3d day of October, 1917.

BOURQUIN, J.

Filed and entered Oct. 3, 1917. Geo. W. Sproule,
Clerk. [191]

Thereafter, on December 3d, 1917, petition for appeal was duly filed herein, in the words and figures following, to wit. [192]

*In the District Court of the United States, in and for
the District of Montana.*

No. — IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Petition for Appeal.

To the Honorable GEORGE M. BOURQUIN, Judge
of the Above-Entitled Court:

The above-named defendant feeling itself aggrieved by the decree made and entered in this cause on the 3d day of October, A. D. 1917, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons specified in the assignment of errors, which is filed herewith, and it prays that its appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings

and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made, and petitioner further desiring to supersede the execution of the said decree, hereby tenders bond in such amount as the Court may require for the purposes [193] of this appeal, and of such supersedeas, and prays that with the allowance of the appeal and supersedeas be issued.

Dated this 3d day of December, 1917.

SCOTT, BANCROFT, MARTIN &
STEPHENS,

EDWIN L. NORRIS and
GEORGE E. HURD,

Solicitors for Defendant and Solicitor.

Service of foregoing petition and receipt of copy thereof admitted Dec. 3, 1917.

COOPER, STEPHENSON & HOOVER,
Attys. for Plff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. [194]

Thereafter on December 3d, 1917, order allowing appeal and fixing bond was duly filed and entered herein, the words and figures following, to wit:
[195]

*In the District Court of the United States in and for
the District of Montana.*

No. —IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corpo-
ration,

Defendant.

**Order Allowing Appeal and Supersedeas and Fixing
Bond.**

On reading and filing the petition of the defendant herein for an order allowing appeal and supersedeas herein and the assignment of errors having been made and signed by the solicitors of the defendant and filed herein;

It is ordered that the said petition be granted and the said appeal and supersedeas be allowed upon the giving of a bond by the defendant in the sum of \$ Twenty Thousand conditioned as required by law;

And it is further ordered that a transcript of the record and all proceedings had in said cause be

forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit;

And it is further ordered that the allowance of the said appeal shall operate as a supersedeas upon the filing by the defendant petitioner herein of a bond in the sum of \$ Twenty Thousand, as aforesaid, with sufficient sureties to be conditioned as required by law and [196] which said supersedeas shall operate and be in full force and effect until the final determination of the said appeal by the United States Circuit Court of Appeals and until the further order of this Court.

Dated this 3d day of December, 1917.

GEO. M. BOURQUIN,
Judge.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk. [197]

Thereafter, on December 3d, 1917, assignment of errors was duly filed herein, in the words and figures following, to wit: [198]

*In the District Court of the United States for the
District of Montana.*

No. —IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Cor-
poration,

Defendant.

Assignment of Errors.

Now comes the United States Gypsum Company, a corporation, defendant in the above-entitled cause, and prays an appeal from the order and decree of the Court entered herein on the 3d day of October, A. D. 1917, and says that the said order and decree is erroneous and unjust to defendant because:

1. The Court erred in failing to hold that the complainant received from the defendant sufficient notice of the intention of the defendant not to purchase the properties of the Mackey Wall Plaster Company under the contracts of June 15, 1909, July 1, 1910 and July 6, 1915, respectively.

2. The Court erred in failing to hold that the letter of April 9, 1916, from defendant to complainant was sufficient notice to complainant of the intention of the United States Gypsum Company not to purchase the property of the Mackey Wall Plaster Company.

3. The Court erred in failing to hold that complainant, The Mackey Wall Plaster Company, waived notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required [199] by the contract of July 6th, 1915.

4. The Court erred in failing to hold that the complainant, The Mackey Wall Plaster Company, estopped itself from claiming, that it did not receive sufficient notice of the intention of the United States Gypsum Company not to purchase the properties of The Mackey Wall Plaster Company, as required by

the contract of July 6th, 1915.

5. The Court erred in failing to hold that the contract of June 15, 1909, and the extensions thereof on July 1, 1910 and July 6, 1915, respectively, could not be specifically enforced in equity at the suit of either the plaintiff or the defendant, and that said contracts were of such a nature, that they could not be specifically enforced in equity.

6. The Court erred in failing to hold that before complainant could maintain its cause of action against the defendant, it was necessary for the complainant to procure and deliver to the defendant the written consent of the Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company.

7. The Court erred in holding that complainant could procure said consent after the trial of said cause, and if it procured the same or a discharge of the covenant contained in said lease requiring such written consent, within thirty (30) days after the opinion was filed in said cause, the decree therein should be as prayed in complainant's said bill of complaint.

8. The Court erred in making order permitting taking of depositions of Robert I. Farrington and L. E. Katzenbach.

9. The Court erred in making order of September 4th, 1917, for a further hearing at Missoula on [200] October 3d, 1917, for the taking of further testimony.

10. The Court erred in overruling motion of defendant to suppress depositions of said Katzenbach

and Farrington and in admitting their depositions herein.

11. The Court erred in overruling objections of defendant to a question propounded to Robert I. Farrington, as follows: "As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?"

12. The Court erred in overruling objections of defendant to the following question set forth in the deposition of L. E. Katzenbach, to wit: "Read the part with reference to the election of Mr. Farrington."

13. The Court erred in holding that the consent procured by the complainant and filed herein was the written consent duly given by the Great Northern Railway Company and made and delivered by it as a consent to an assignment of said lease to the United States Gypsum Company.

14. The Court erred in receiving the instrument filed by the complainant herein and purporting to be the consent of the said Great Northern Railway Company to an assignment of said lease.

15. The Court erred in granting the motion of the complainant made herein on September 4, 1917, to enter a decree for complainant, based upon the presentation by the complainant of the said instrument purporting to be the consent of the Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company, and in denying the motion of the defendant made herein on September 4, 1917, to en-

ter a decree for said defendant.

16. The Court erred in allowing to the complainant [201] by its final decree in said cause interest on the sum of Fifteen Thousand Dollars (\$15,000) at eight per cent (8%) per annum from July 6, 1916, and in allowing interest to said complainant by its final decree at five per cent (5%) per annum from July 6, 1916, upon the promissory notes mentioned in said decree.

17. The Court erred in providing in said decree that defendant pay the complainant the sum of money therein mentioned and execute the promissory notes therein described upon complainant executing a proper conveyance and delivering the written consent of The Great Northern Railway Company to the assignment of the lease of June 22, 1908, to the United States Gypsum Company.

18. The Court erred in entering its final decree in said cause in favor of the said complainant.

19. The Court erred in failing to enter a decree in said cause for the defendant, and in failing to dismiss the said bill of complaint for want of equity.

WHEREFORE, the defendant prays that the said order and decree be reversed and the District Court be directed to dismiss the bill of complaint.

SCOTT, BANCROFT, MARTIN &

STEPHENS and

EDWIN L. NORRIS and

GEORGE E. HURD.

Solicitors for Said Defendant.

Service of within Assignment of Errors admitted
this 3d day of December, 1917.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk.
[202]

Thereafter, on December 4th, 1917, bond on appeal
was duly filed herein, in the words and figures fol-
lowing, to wit: [203]

*In the District Court of the United States, in and for
the District of Montana.*

No. ———IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corpo-
ration,

Defendant.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:
That we, United States Gypsum Company, a corpo-
ration, as principal and American Surety Company,
as surety, acknowledge ourselves to be jointly and
severally indebted to The Mackey Wall Plaster
Company, a corporation, appellee in the above-en-
titled cause, in the sum of Twenty Thousand Dol-

lars, conditioned that, whereas, on the 3d day of October, 1917, in the District Court of the United States for the District of Montana, in an action pending in that court wherein The Mackey Wall Plaster Company, a corporation, was plaintiff and the United States Gypsum Company, a corporation, was defendant, numbered on the equity docket as —, a decree was rendered against the said United States Gypsum Company and the said United States Gypsum Company having obtained an appeal to the Circuit Court of Appeals of the United States in and for the Ninth Circuit and filed a copy [204] thereof in the office of the clerk of the court to reverse the said decree and a citation directed to the said The Mackey Wall Plaster Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the city of San Francisco, in the State of California, on the — day of January, A. D. 1918 next.

Now, if the said United States Gypsum Company shall prosecute its appeal to effect and answer all damages and costs if it shall fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

UNITED STATES GYPSUM COMPANY.

By S. L. AVERY,

Prest.

S. T. MESERVING,

Secretary.

AMERICAN SURETY COMPANY.

By JOHN R. MAYBE,

Its Attorney in Fact.

Approved this 3d day of December, 1917.

WALKER & WALKER,
By THOMAS J. WALKER,
Attorney.

The above and foregoing Bond on Appeal is approved this 4th day of Dec., 1917.

BOURQUIN,
Judge of the Above-entitled Court.

Filed Dec. 4, 1917. Geo. W. Sproule, Clerk. [205]

Thereafter, on December 4th, 1917, Citation was duly issued herein, which said citation is hereto annexed and is in the words and figures following, to wit: [206]

*In the District Court of the United States, in and for
the District of Montana.*

No. ———IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corpo-
ration,

Defendant.

Citation on Appeal.

United States of America,

District of Montana,—ss.

The President of the United States to the Mackey Wall Plaster Company, a Corporation, and to Messrs. Cooper, Stephenson & Hoover, Its Solicitors:

You are hereby notified that in a certain case in equity in the United States District Court in and for the District of Montana, wherein The Mackey Wall Plaster Company, a corporation, is complainant, and the United States Gypsum Company, a corporation, is defendant, an appeal has been allowed the said defendant therein to the United States Circuit Court of Appeals for the Ninth Circuit.

You are hereby cited and admonished to be and appear in the said United States Circuit Court of Appeals at San Francisco, California, within 30 days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be [207] corrected and speedy justice done the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, Judge of the United States District Court for the District of Montana, this the 4th day of Dec., A. D. 1917.

BOURQUIN,
Judge of the District Court of the United States for
the District of Montana.

Personal service of the foregoing citation upon us

and the receipt of a copy thereof on this the 3d day of December, 1917, are hereby acknowledged.

COOPER, STEPHENSON & HOOVER,
Solicitors for Complainant. [208]

[Endorsed]: No. 78. In the District Court of the United States in and for the District of Montana. The Mackey Wall Plaster Company, a Corporation, Plaintiff, vs. United States Gypsum Company, a Corporation, Defendant. Citation. Filed Dec. 4, 1917. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. [209]

Thereafter, on December 3d, 1917, Praecept for Transcript on Appeal was duly filed herein, in the words and figures following, to wit: [210]

*In the District Court of the United States in and for
the District of Montana.*

No. —IN EQUITY.

THE MACKEY WALL PLASTER COMPANY, a
Corporation,

Plaintiff,

versus

UNITED STATES GYPSUM COMPANY, a Corpo-
ration,

Defendant.

Praecept for Transcript on Appeal.

To the Clerk of the Above-entitled Court:

You will please incorporate into the transcript on

appeal in the above-entitled action the following portions of the record in said cause, to wit:

1. Complainant's amended complaint.
2. Defendant's answer to the amended complaint.
3. Plaintiff's reply to defendant's answer.
4. The statement of the evidence as settled by the judge of the above-entitled court.
5. The opinions of the Court rendered in said cause.
6. Notice of taking depositions of R. I. Farrington, L. E. Katzenbach, and others, at St. Paul, Minnesota, September 25, 1917.
7. Affidavit of W. H. Hoover supporting applications to take said depositions.
8. Application for permission to take said depositions. [211]
9. Order of Court permitting the taking of said depositions.
10. The final decree rendered and entered therein.
11. The petition on appeal.
12. The order allowing the appeal and supersedeas.
13. The assignment of errors.
14. The bond on appeal.
15. The citation on appeal and proof of service.
16. The clerk's certificate to transcript of record and the names and addresses of the solicitors of record.

Dated this 3d day of December, 1917.

SCOTT, BANCROFT, MARTIN & STEPHENS,

EDWIN L. NORRIS and
GEO. E. HURD,

Solicitors for Defendant.

Service upon us this the 3d day of December, 1917, at Great Falls, Montana, of a copy of the foregoing Praecipe indicating portions of the record to be incorporated into the transcript on appeal is hereby acknowledged by us.

COOPER, STEPHENSON & HOOVER,
Solicitors for Plaintiff.

Filed Dec. 3, 1917. Geo. W. Sproule, Clerk.
[212]

Thereafter, on Dec. 31, 1917, order extending time to file record on appeal was duly entered herein, in the words and figures following, to wit:

*In the District Court of the United States in and for
the District of Montana.*

THE MACKEY WALL PLASTER COMPANY,
a Corporation,

Plaintiff,

vs.

UNITED STATES GYPSUM COMPANY, a Corporation,

Defendant.

Order Extending Time to and Including January 15, 1918, to File Transcript on Appeal.

Good cause having been shown to the Court, it is hereby ordered that the time for filing the transcript on appeal in the Circuit Court of Appeals is hereby extended to and inclusive of January 15th, 1918.

Dated this 31 day of December, 1917.

[Seal]

BOURQUIN,
Judge.

Entered Dec. 31, 1917. C. R. Garlow, Clerk.
[213]

**Certificate of Clerk U. S. District Court to
Transcript of Record.**

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 213 pages, numbered consecutively from 1 to 213, inclusive, is a full, true and correct transcript of the pleadings, orders, opinions of the court, and decree, and all other proceedings in said cause required to be incorporated in the record on appeal therein by the praecipe of the appellant for said record on appeal, including said praecipe, and of the whole thereof, as appears from the original records and

files of said court in my possession as such clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of ninety-seven and 75/100 dollars (\$97.75), and have been paid by the appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court at Helena, Montana, this 4th day of January, A. D. 1918.

[Seal]

C. R. GARLOW,
Clerk. [214]

[Endorsed]: No. 3111. United States Circuit Court of Appeals for the Ninth Circuit. United States Gypsum Company, a Corporation, Appellant, vs. The Mackey Wall Plaster Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Montana.

Filed January 8, 1918.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT

UNITED STATES GYPSUM COMPANY, a corporation,
Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

SCOTT, BANCROFT, MARTIN & STEPHENS,
NORRIS & HURD,
JOHN E. MACLEISH,

Attorneys for Appellant.

JOHN E. MACLEISH,
Of Counsel.

Filed, April 11, 1918.
Clerk.

IN THE
United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT

UNITED STATES GYPSUM COMPANY, a corporation,
Appellant,
vs.

THE MACKEY WALL PLASTER COMPANY, a corporation,
Appellee.

BRIEF FOR APPELLANT.

STATEMENT OF THE CASE.

The bill of complaint was filed herein by the Mackey Wall Plaster Company, a Montana corporation of Great Falls, Montana, appellee herein, against the United States Gypsum Company, a New Jersey corporation of Chicago, Illinois, appellant herein, for the specific performance of that certain contract of June 15, 1909, made between appellee and appellant, and the extensions thereof made on July 1, 1910, and July 6, 1915, respectively. The agreement of June 15, 1909, some times referred to as the original contract, leased certain premises herein-after mentioned, to appellant for the term of one year.

The agreement of July 1, 1910, extended the term of the original contract for five years, and the agreement of July 6, 1915, extended the term for one year from July 6, 1915.

The original contract of June 15, 1909, contained an option found in paragraph "Thirteenth" thereof (Rec., 72), whereby appellee granted to appellant the right to purchase, at any time before the expiration of the term mentioned in said contract, all the property and property rights therein described for \$50,000, \$15,000 thereof to be paid in cash at the time of the execution and delivery of the conveyance, and the balance of \$35,000 to be evidenced by promissory notes of appellant, each for the sum of \$5,000 payable to appellee one, three, six, nine, twelve, fifteen, eighteen and twenty-one months after date thereof, respectively. It was further provided in the option, that appellee would convey to appellant all of the property and property rights mentioned therein, by a good and sufficient warranty deed, and that appellant should enjoy the same without any disturbance by any person or persons whomsoever. By the option as given, appellee agreed to sell to appellant upon the exercise thereof, (1) a leasehold interest, with mill erected thereon, near Great Falls, Montana. The land belonged to the Great Northern Railway Company, and was held by appellee under a ten-year lease dated June 22, 1908; (2) all gypsum and minerals underlying several acres of land near Riceville, Montana, and a right of way over certain

adjacent lands; and (3) a ninety-nine year lease interest in several acres of land near the premises last mentioned.

The original contract of June 15, 1909, also contained an option by A. D. Mackey and his wife, as owners and holders of all of the capital stock of appellee, to appellant to purchase from the said Mackeys, if appellant should not have elected to purchase said property and property rights, all of the issued shares of the capital stock of appellee for the same price and upon the same terms and conditions as those contained in the option first above mentioned, except that the consideration was to be paid to the said Mackeys. It is not claimed that appellant exercised this option, and it is merely referred to here because mentioned in the bill of complaint.

It was provided in said extension of July 1, 1910, that appellee leased to appellant the real estate and mining property situated near the Village of Riceville and subleased the real estate situated near the City of Great Falls subject to the terms and conditions of said original lease, and that all the rights and privileges granted in and by the agreement of June 15, 1909, were extended and renewed for a term of five years. (Rec., 15-22.) Under the option contained in the original agreement and renewed by the agreement of July 1, 1910, appellant had the right to purchase the property, at any time before the expiration of the term of the lease, without the necessity of giving any notice of its intention to purchase the same.

It was provided in the extension of July 6, 1915 (Rec., 25-26), as follows:

“Now, THEREFORE, in consideration of the premises
 * * * it is agreed that the said instruments dated
 June 15, 1909, and July 1, 1910, be in all things and
 respects extended, renewed and made valid and of
 full force and effect for the further period of one
 (1) year from and after the date hereof. And as a
 further consideration for said extension lessee agrees
 that if it shall determine that it will not avail itself
 of the option in said several agreements contained to
 purchase the property of the lessor, Mackey Wall
 Plaster Company, upon the terms and conditions in
 said several instruments provided, it will at least
 sixty (60) days prior to the first day of July, 1916,
 give the lessors in writing a notice to the effect that
 lessee will not purchase the said property under and
 by virtue of said agreements; and it is agreed that
 if lessee shall neglect or fail to give such notice,
 at least sixty days before the first day of July,
 1916, it will thereby become obligated to make such
 purchase and pay the consideration in said instru-
 ments provided to be paid in the event of purchase
 * * * .”

the effect of which was to extend the option to purchase for one year from July 6, 1915, so that the option expired on July 6, 1916, but appellant was required, if it determined not to purchase, to give to appellee sixty days' notice in writing prior to July 1, 1916, of its intention not to purchase said property.

In a letter dated July 14, 1915, addressed to appellant by appellee, it was provided that the notice to be given

under said contract of July 6, 1915, would be sufficient if deposited in the United States mails, postage prepaid, and enclosed in an envelope addressed to either the Mackey Wall Plaster Company, A. D. Mackey or Myra Post Mackey at the City of Great Falls, County of Cascade, State of Montana. (Rec., 28.)

The amended bill of complaint alleged that appellant, having elected not to purchase said premises, failed and neglected to serve notice thereof in writing upon appellee within sixty days prior to May 1, 1916. Appellee proceeded upon the theory, that the failure of appellant to give notice of its intention not to purchase said premises within sixty days prior to May 1, 1916, operated as an election by appellant to purchase, and prayed for specific performance of said contracts and a decree for the purchase price of the properties in question.

Appellant denied in its answer, that it had elected to purchase said premises and alleged that on the contrary thereof it notified appellee by letter dated April 19, 1916 (Rec., 94-95), of its intention not to purchase, more than sixty days prior to May 1, 1916, in words and figures as follows:

“On May 5th our option to purchase your mill property at Great Falls expires.

I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.

We have had men looking for gypsum almost constantly since our last meeting, and so far our efforts have been fruitless.

If you care to come down and talk the matter over we will be glad to have you do so.

Expect to give you formal notice on May 5th that we do not care to purchase your property'';

which letter was received on or about the date thereof by A. D. Mackey, the president and general manager of appellee. Appellant further answered that appellee, following the receipt of the letter of April 19, and on or about April 28, 1916, was informed at a conference had in Chicago, Illinois, between the said A. D. Mackey and O. M. Knode, manager of operations of appellant, that appellant would not purchase said premises; that the notice so given to the said Mackey was accepted by him, and appellee and appellant through their said agents then and there entered into negotiations for a new lease. (Rec., 41-48.)

Although it must be conceded by appellee, that it received actual notice of the unwillingness of appellant to purchase the properties mentioned in the option, it contended that appellant failed to give notice in writing as provided in said extension of July 6, 1915. The basis of appellee's whole claim was founded upon the technical position, that appellant failed to give notice in writing of its determination not to purchase the property. Appellant contended that the letter of April 19, 1916, was sufficient notice, and that there could be no doubt of its meaning after the conference of April 28, 1916, whereat

appellee was informed of the intention of appellant not to purchase the properties.

Appellant further alleged in its answer, that at the conference of April 28, 1916, between Mackey and Knode, appellee by accepting the notice of intention not to purchase and entering into negotiations for a new lease, waived any necessity that there may have been for any further notice, and estopped itself from claiming that the notice as given was insufficient. This allegation of the answer, as we view the record, was fully sustained by the evidence. When the conference ended, it was fully understood, that appellant would send a written proposition for a new lease to appellee at Great Falls. Letters of introduction to the superintendent at the mine were dictated and mailed to Mackey at Minneapolis, for the purpose of enabling him to visit the mines at Great Falls, and pass upon the proposition of appellant. At the same time a letter was sent to the superintendent, which, according to the testimony of two witnesses, was dictated in Mackey's presence (Rec., 132) and in which it was said:

“Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property to determine what course of action he will take and whether or not he will renew the lease with us.

The time expires on the 5th day of July. At this time if the lease is not renewed we will withdraw from the property.”

On May 11th, about the time appellant expected Mackey would be in Great Falls, it sent a letter to him containing a proposition for a new lease. In, that letter appellant reviewed what had transpired on and before April 28th, and closed by proposing an extension of the lease for a year, or for an indefinite term, subject to cancellation upon sixty days' notice. (Rec., 136.)

Mackey went to Great Falls during the early part of May, but did not visit the mine. On the contrary, he served notice upon appellant, that because it had failed to notify him in writing of its unwillingness to purchase the property it had thereby elected to purchase the same.

It was further alleged in the answer of appellant that appellee was not the owner in fee simple of all of the properties described in said contracts, and that it was unable to convey a good title to said premises free and clear of all encumbrances, and that it was unable to convey and transfer to appellant the premises described in said amended bill of complaint. In the lease between appellee and the Great Northern Railway Company it was provided, that the same could not be assigned without the written consent of the Railway Company. Appellant claimed, that the contract in this case could not be specifically enforced because the court could not compel the execution of the written consent by the Great Northern Railway Company. The contract therefore lacked mutuality of remedy. It also claimed, that appellee could not maintain its action without having first ob-

tained the written consent of the Railway Company to an assignment of said lease.

The cause was tried submitted to the court and taken under advisement, and appellee closed its case without offering any evidence of consent on the part of the Great Northern Railway Company to an assignment of the lease. On July 27, 1917, a few months after the cause was tried, the court rendered an opinion holding, that the letter of April 19, 1916, was not sufficient notice of the determination of appellant not to purchase; that the contract could be specifically enforced in equity; but finding that no decree for specific performance could be rendered until appellee produced the written consent of the Great Northern Railway to the assignment of the lease aforesaid. In its opinion the court concluded with the words (Rec., 207):

“If within thirty days plaintiff secures the railway lessor’s consent to the assignment, or a discharge of the covenant, and in all else is ready to perform, it shall have decree as prayed. Otherwise decree for defendant.”

At subsequent proceedings had in said cause and without entering any order reopening said cause, appellee was permitted to introduce in evidence a paper purporting to be the written consent of the Great Northern Railway Company (Rec., 177), which paper bore no date and no seal of the Great Northern Railway Company and was signed, “Great Northern Railway Company by R. I. Farington, its second vice president.” Appellee was also

permitted to take depositions to prove that said paper was signed by one R. I. Farrington when he was acting as second vice president of the Great Northern Railway Company. The deposition of Robert I. Farrington showed, that he served as a vice president of the Great Northern Railway Company until December 31, 1912, but did not show on what date the said purported consent was signed by him. (Rec., 185-186.) The deposition of L. E. Katzenbach was received to prove the authority of a vice president to execute such an instrument during the time Farrington acted as such. His evidence, however, showed, that he had been secretary of the Great Northern Railway Company since 1912 and that he had no personal knowledge of the records mentioned by him in his deposition, prior to the date of his employment. (Rec., 192.) The deposition of R. J. Reynolds was received to show that he was a clerk in the legal department of the Great Northern Railway Company in the office of Veazie & Veazie at Great Falls in the months of May and June, 1909, and that he received the foregoing consent in the mail from the office of the Great Northern Railway Company at St. Paul, Minnesota, signed by Mr. Farrington. (Rec., 193-196.) The deposition of W. H. Hoover was taken to show, that he received the said purported consent from I. Parker Veazie, Jr., one of the members of the firm of Veazie & Veazie, and to show delivery of the consent in the following manner:

“He produced from the file and handed to me the consent, Plaintiff’s Exhibit ‘A,’ which is attached

to Mr. Farrington's deposition, and stated that the consent had been given long prior to this time for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it." (Rec., 198.)

There was no competent evidence of delivery of the consent by the Railroad Company to appellee, or to appellant.

It was contended by appellant, that the said depositions were taken and received in violation of Federal Equity Rule 47; that the evidence was incompetent and not binding upon the Great Northern Railway Company or appellant; and that proof of the delivery of said instrument by Mr. Veazie to Mr. Hoover, at a time long after the witness Farrington ceased to be a vice president of the Railway Company, did not constitute a delivery of said consent by the Railway Company.

The court upon such evidence entered a final decree, decreeing that appellant pay to appellee the sum of \$15,000 with interest at 6 per cent. per annum from July 6, 1916, and execute and deliver to appellee its seven promissory notes for \$5,000 each, dated July 6, 1916, with interest at 5 per cent. per annum from date thereof. Appellant objected to the assessment of interest on the ground that it was improper to award interest on said amounts from July 6, 1916, when the record showed and the court found, that appellee was not entitled to a decree before it procured the written consent of the Great Northern Railway Company, above mentioned.

The contract contemplated that no payments were to be made by appellant, until appellee made the conveyance of the premises in accordance with the terms of the agreement.

SPECIFICATION OF ERRORS.

1.

The court erred in failing to hold that the complainant received from the defendant sufficient notice of the intention of the defendant not to purchase the properties of the Mackey Wall Plaster Company under the contracts of June 15, 1909, July 1, 1910, and July 6, 1915, respectively.

2.

The court erred in failing to hold that the letter of April 19, 1916, from defendant to complainant was sufficient notice to complainant of the intention of the United States Gypsum Company not to purchase the property of the Mackey Wall Plaster Company.

3.

The court erred in failing to hold that complainant, The Mackey Wall Plaster Company, waived notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required by the contract of July 6, 1915.

4.

The court erred in failing to hold that the complainant, the Mackey Wall Plaster Company, estopped itself from claiming, that it did not receive sufficient notice of the intention of the United States Gypsum Company not to purchase the properties of the Mackey Wall Plaster Company, as required by the contract of July 6, 1915.

5.

The court erred in failing to hold that the contract of June 15, 1909, and the extensions thereof on July 1, 1910, and July 6, 1915, respectively, could not be specifically enforced in equity at the suit of either the plaintiff or the defendant, and that said contracts were of such a nature, that they could not be specifically enforced in equity.

6.

The court erred in failing to hold that before complainant could maintain its cause of action against the defendant, it was necessary for the complainant to procure and deliver to the defendant the written consent of the Great Northern Railway Company to an assignment of the lease of June 22, 1908, to the United States Gypsum Company.

7.

The court erred in holding that complainant could procure said consent after the trial of said cause, and if it procured the same or a discharge of the covenant con-

tained in said lease requiring such written consent, within thirty (30) days after the opinion was filed in said cause, the decree therein should be as prayed in complainant's said bill of complaint.

8.

The court erred in making order permitting taking of depositions of Robert I. Farrington and L. E. Katzenbach.

9.

The court erred in making order of September 4, 1917, for a further hearing at Missoula on October 3, 1917, for the taking of further testimony.

10.

The court erred in overruling motion of defendant to suppress depositions of said Katzenbach and Farrington and in admitting their depositions herein.

11.

The court erred in overruling objections of defendant to a question propounded to Robert I. Farrington as follows: "As such officer was it a part of your duties to sign contracts and instruments affecting the title to the real property and right of way of the Railway Company?"

12.

The court erred in overruling objections of defendant to the following question set forth in the deposition of L. E. Katzenbach, to wit: "Read the part with reference to the election of Mr. Farrington."

13.

The court erred in holding that the consent procured by the complainant and filed herein was the written consent duly given by the Great Northern Railway Company and made and delivered by it as a consent to an assignment of said lease to the United States Gypsum Company.

14.

The court erred in receiving the instrument filed by the complainant herein and purporting to be the consent of the said Great Northern Railway Company to an assignment of said lease.

15.

The court erred in granting the motion of the complainant made herein on September 4, 1917, to enter a decree for complainant, based upon the presentation by the complainant of the said instrument purporting to be the consent of the Great Northern Railway Company to an assignment of said lease of June 22, 1908, to the United States Gypsum Company, and in denying the motion of the defendant made herein on September 4, 1917, to enter a decree for said defendant.

16.

The court erred in allowing to the complainant by its final decree in said cause interest on the sum of fifteen thousand dollars (\$15,000) at eight per cent. (8%) per annum from July 6, 1916, and in allowing interest to said complainant by its final decree at five per cent. (5%) per annum from July 6, 1916, upon the promissory notes mentioned in said decree.

17.

The court erred in providing in said decree that defendant pay the complainant the sum of money therein mentioned and execute the promissory notes therein described upon complainant executing a proper conveyance and delivering the written consent of the Great Northern Railway Company to the assignment of the lease of June 22, 1908, to the United States Gypsum Company.

18.

The court erred in entering its final decree in said cause in favor of the said complainant.

19.

The court erred in failing to enter a decree in said cause for the defendant, and in failing to dismiss the said bill of complaint for want of equity.

ARGUMENT.

I.

APPELLEE, BY THE LETTER OF APRIL 19, 1916, RECEIVED NOTICE OF THE INTENTION OF APPELLANT NOT TO PURCHASE THE PROPERTIES DESCRIBED IN THE CONTRACT OF JUNE 15, 1909, AND BY ENTERING INTO NEGOTIATION FOR A NEW LEASE, WAIVED ANY FURTHER NOTICE.

By the terms of the original contract of June 15, 1909, appellant had the privilege of buying appellee's property at any time before the expiration of the lease, or any extension thereof. (Rec., 72-75.) When the supplemental agreement of July 6, 1915, was made it was provided, that the instruments of June 15, 1909, and July 1, 1910, the latter being an extension of the original contract, were in all things and respects extended, renewed and made valid and of full force and effect for the further period of one year from and after the date thereof. (Rec., 25.) The option was thereby extended to July 6, 1916, subject only to the condition, that if appellant determined not to purchase, it would give notice thereof in writing to appellee sixty days prior to July 1, 1916. (Rec., 25-26.)

The option to purchase, as shown, did not expire until July 6, 1916, and the only object or purpose of any notice was to advise the vendor of the fact, that the vendee had determined not to purchase, in case it so determined, before the option expired. Under these circumstances any

notice by appellant to appellee which made known to the latter the determination of the former not to purchase, was sufficient notice under the supplemental agreement of July 6, 1915.

On April 19, 1916, appellant's manager of operations addressed a letter to A. D. Mackey, the president and general manager of appellee, at Minneapolis, Minnesota (Rec., 94), wherein it was said:

"On May 5th our option to purchase your mill property at Great Falls expires.

I am writing you in advance of that date to inform you that conditions in Montana at this time are such that it will be necessary for us to cancel our arrangement with you at the time of its expiration, which is July 5th.

We have had men looking for gypsum almost constantly since our last meeting and so far our efforts have been fruitless.

If you care to come down and talk the matter over we will be glad to have you do so.

Expect to give you formal notice on May 5th that we do not care to purchase your property."

A few days thereafter, and on April 28, 1916, at a conference in Chicago, A. D. Mackey, president and general manager of appellee, and O. M. Knode and John H. Nold, manager of operations and general superintendent, respectively, of appellant, discussed the question of the unwillingness of appellant to purchase the properties of appellee (Rec., 110, 126-131, 155-165), and at a time when it was fully understood by appellee, that appellant had

determined not to purchase, entered into negotiations for a new lease. (Rec., 113-114, 128-134, 158, 162, 163.) It is our contention on behalf of appellant that, (a) the letter of April 19th informed appellee of the determination of appellant not to purchase the properties under the option; and (b) if there was any question of the sufficiency of the letter of April 19th to serve the purpose claimed for it by us, the conduct of appellee's president and general manager at the meeting of April 28th, waived the necessity for any further notice, and estopped appellee from claiming that the notice as given, was not sufficient.

Mr. Knode testified that, upon Mackey's arrival on April 28, 1916, he explained to Mackey the reason why the United States Gypsum Company had decided not to purchase the property of the Mackey Wall Plaster Company, following which an extended discussion was had among Mackey, Knode and Nold concerning the physical condition of the properties, and the inability of appellant to procure gypsum therefrom. (Rec., 133, 155.) All present at that meeting, including Mr. Mackey, testified that it was stated by Mr. Knode, that appellant would not purchase the properties of appellee. (Rec., 110-111, 133, 155.) The question of a new lease was then discussed, and it was arranged, that Knode would write to Mackey at Great Falls, stating the terms upon which appellant would continue the lease.

Knodel said Mackey asked him, "Well, what will you do, what can you do?", in reply to which Knodel said, that there was only one thing they were willing to do, and that was to continue the lease for an indefinite period on terms that would allow them to retire from the property whenever the gypsum became exhausted. Mackey inquired what he meant by that, and Knodel replied that it would have to be a short-term lease or a lease for a year subject to cancellation upon thirty days' notice. (Rec., 128-130, 133-134.) Mackey then requested Knodel to write him the proposition as outlined, saying that he would return to Minneapolis and later go to Great Falls, to which Knodel said he would write him at Great Falls. (Rec., 134.) The testimony of Mr. Knodel was corroborated by the testimony of Mr. Nold. (Rec., 155-165.) On May 11th, and before Mackey claimed, that appellant had purchased the properties, Knodel wrote him (Rec., 136) reviewing the things which transpired on and before April 28th, and containing a proposition to continue the lease as follows:

"With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operation at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein.

We are willing, however, to enter into an extension of these contracts, whereby all of the provisions

thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty days' written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore.'" (Rec., 136.)

Mr. Mackey admitted the facts substantially as they were stated by Knode. He said:

"When I was in Mr. Knode's office in Chicago he told me that the defendant would not purchase my property, and further stated that he would send me a formal notice on May 4th, or May 5th, * * * that we do not desire to purchase your property. I answered. I said, 'Well, whatever your company decides to do, you may send to me, care of Mr. Ransom Cooper.' * * * (Rec., 110-111.) When I was in Chicago I talked with Mr. Knode and Mr. Nold concerning the making of a new lease. When I went back * * * he said, 'Well, if it met with his company's approbation he would favor a continuing of the lease, their taking their rent monthly in advance, they to give ninety days' notice in case they wished to surrender the property.' In response to this statement of Mr. Knode I said, 'Well, you put in writing what you folks have in mind and send it to Mr. Cooper.' * * * After lunch was this other matter of his proposal that he would like to continue the lease. I said, 'Put in writing whatever you folks have in your mind and send it to Mr. Cooper,' and he wanted to know if I would answer promptly. I answered him we would. (Rec., 113-114.) * * * When we were discussing the making of a new lease I had no means of knowing what they

had in mind. I was in the dark. They had a right to send that notice and they had a right not to. It was not a fact that when I left the office of the Gypsum Company I was aware the defendant had decided not to buy my property, if that had been their position. I know just a little about business and know that the thing then for them to have done was to have written out that formal notice and handed it to me and taken a receipt for it at the time. (Rec., 116-117.)

* * * Mr. Knode stated to me in Chicago that if the company would acquiesce in his idea he would favor continuing the lease subject to cancellation on ninety days' notice. I said to him, 'Whatever your company decides to do in the matter, put in writing and send it out.' '' (Rec., 119.)

Although Mackey repeatedly said, that he did not know when he left Chicago that appellant had decided not to purchase the properties, his own evidence of what was actually said, showed the contrary.

At the conference above mentioned, according to the testimony of Knode and Nold, two letters were dictated to the superintendent at Great Falls, one to be given to Mr. Mackey introducing him to the superintendent, and the other to the superintendent advising him of the expected visit of Mr. Mackey. (Rec., 130, 162.) These letters were dictated at the end of the conference, and, as explained by Mr. Knode, were written up and mailed the next day and therefore bear date April 29th. This was corroborated by the letter of April 29, 1916, addressed to Mr. Mackey (Rec., 131), in which the letter introducing him to the

superintendent was enclosed. In the letter of April 29th (Rec., 132) written in the presence of Mr. Mackey, and at a time when no dispute had arisen between the parties, the following is found:

“Mr. A. D. Mackey, owner of the property at Great Falls and Riceville, will visit you in the course of the next week or ten days, with a view to looking over the property to determine what course of action he will take and whether or not he will renew the lease with us. The time expires on the 5th day of July. At this time, if the lease is not renewed, we will withdraw from the property.”

It is difficult to understand how Knode could dictate such a letter if it did not contain in substance the negotiations had at the conference of April 28, 1916. Mackey denied that the letter was written in his presence (Rec., 115) and said (Rec., 103):

“On my way to the hotel I thought of one thing I had forgot so when I got to the hotel I rung up Mr. Knode and said I had forgot to ask for the customary letter of permit to look at the mill and the mine, and Knode said he would send it and include Mr. Cooper's name in the permit.”

Mackey also said, for the purpose of bolstering up his denial, that he remembered the fact, because he used a new nickel phone arrangement, and, that he was surprised when he received the letter in Minneapolis the next day as he expected to receive it in Great Falls. (Rec., 114.) But he had already testified on direct examination, that Knode said he would mail it to him at Minneapolis (Rec., 103), nor could he

have received the letters upon his arrival in Minneapolis the next day as they were dated and mailed Saturday, April 29th, and could not have been received at his address through the mails before Monday, May 1st. Mackey's recollection of the incident of running across a new telephone arrangement, and his recollection of surprise, where none could have occurred, was merely an effort to avoid the effect of the statements contained in the letters of April 29th, dictated in his presence. The evidence also shows, that Knode left his office immediately following Mackey's departure (Rec., 135, 164), and it would have been impossible for him to have received any such telephone communication, as outlined by Mackey.

In other respects the testimony of the three witnesses substantially agreed as to what took place at the meeting of April 28, 1916, except that Mackey claimed that on one occasion, when Nold was not in the room, Knode made the statement to him that he would send on May 4th or 5th a formal notice of intention not to purchase. (Rec., 111.) Both Mr. Knode and Mr. Nold denied that any such statement was made, and Mr. Nold further testified that he was in the room during the entire conversation. (Rec., 164.) If the parties agreed, as the evidence of all three witnesses showed, that appellant would send the proposition for a new lease to Great Falls, it was not likely, that Knode said he would send the formal notice not to purchase. -

Mackey intended to return to Minneapolis before going

to Great Falls, and any notice sent to him in Great Falls obviously could not have been received by him within sixty days prior to July 1st, as stated in the lease. The last day for any such notice was May 1, 1916, two days following the conference. If Mackey's view of it is accepted, he was in the position of standing by and negotiating for a new lease with knowledge, as admitted by him, that the Gypsum Company would not purchase, he intending not to treat the negotiations seriously because the Gypsum Company had told him that notice would go out on the 4th or 5th of May, at a time too late to accomplish its purpose. Should Mackey be permitted in this court to take advantage of such an intention on his part?

It has frequently been held that mere informality does not vitiate a notice and that no particular form of notice is necessary. The notice is sufficient if it gives the necessary information to the proper parties. It was so held in the following cases:

2 Tiffany on Landlord & Tenant, 1443.

Wiener v. H. Graff & Co., 95 Pac. (Cal. Ct. App.),
167, 169.

Coy v. Title Guarantee & Trust Co., 198 Fed.,
275, 281.

Tooele Meat & Storage Co. v. Morse, 136 Pac.
(Sup. Ct. Utah), 965, 966.

Black v. The Chicago & N. W. Ry. Co., 18 Wis.,
219.

Westenhaver v. German Amer. Ins. Co., 84 N.

W. (Sup. Ct. of Ia.), 717.

Lyon v. Pollard, 87 U. S., 403.

29 Cyc., 1117.

39 Cyc., 1386.

Since the only purpose of the notice was to acquaint appellee of the determination of appellant not to purchase, sixty days before the option expired by its terms, it seems to us that any writing showing that appellant had determined not to purchase was sufficient. If there was any doubt as to the meaning of the notice of April 19, 1916, when it was received, could there be any question of the intention of the United States Gypsum Company, as therein expressed, after the conference of April 28, 1916? There, Mackey was expressly informed of its meaning, and the letter dictated in his presence to the superintendent stated, that unless the lease was renewed appellant would withdraw from the properties. The notice as given was sufficient to advise appellee, that appellant had determined not to purchase before the option by its express terms expired. To hold otherwise would be to penalize appellant for mere failure to give a more formal notice of its intention not to buy, in a case where the privilege to buy had not expired.

We are confident, that upon a record such as this, even if the notice of April 19th, standing alone, should not be regarded as sufficient, the parties waived

the necessity of giving any further notice after the conference of April 28th, and Mackey by his conduct estopped himself from asserting, that he was entitled to any further notice. But suppose for a moment we accept appellee's own theory of the case. It had notice in fact, that appellant would not purchase, but claimed it was entitled to a more formal notice. Mackey, according to his view of it, requested appellee to send the formal written notice, and the proposition for a new lease, to Great Falls, at a time when, if sent, they could not have been received by him until after May 1st, the date fixed in the contract for such notice. The purpose of the notice had already been accomplished, and Mackey did not intend to reach Great Falls until some time after the 1st of May. Would not appellant, under these circumstances, have had a reasonable time within which to send the formal notice, and the proposition for a new lease? The letter of May 11th, sent by appellant about the time Mackey reached Great Falls (Rec., 112) contained the statement that appellant would not purchase, but would lease the properties for a further term.

Appellee did not treat the time for giving such formal notice as of the essence of the contract, when it was satisfied to leave the matter with appellant as it did on April 28th. Upon appellee's theory, the time for giving the formal notice was not treated as material, nor should it be so treated in a court of equity. It is in fact, a

general rule, that time is not considered by courts of equity as of the essence of the contract.

If the parties treated the notice of April 19, 1916 as sufficient, and appellee accepted the statement of appellant at the conference of April 28, 1916 that it had determined not to purchase, and negotiations were then made for a new lease, did not appellee thereby waive the necessity for a further notice and estop itself from saying that any further notice was necessary? Appellant relied upon appellee's conduct, and believed that the matter had resolved itself into negotiations for a new lease. Mackey obtained the letter of introduction to the superintendent at Great Falls and led appellant to believe, that he would examine the properties and answer their proposition for a continuation of the lease. According to his own evidence, he never gave the proposition of appellant any further consideration, nor did he visit the properties in pursuance of his letters of introduction. On the contrary thereof, he wrote his letter of May 12th claiming that the United States Gypsum Company had elected to purchase the property. Mackey, according to the arrangement made in Chicago, did not expect to receive anything further from appellant, except the letters of introduction, until he reached Great Falls. He did not intend to, and in fact could not, reach Great Falls until after May 1st, at a time too late for him to receive from appellant any further notice of intention not to purchase sixty days prior to July 1, 1916. He was to receive in Great Falls and consider, after an examination of the properties, the

proposition of appellant for a new lease, a thing wholly inconsistent with the theory of a purchase of the property by appellant. It follows that appellant relied upon appellee's statement, that it would consider the proposition for a new lease, and under these circumstances no further notice of intention not to purchase could have been intended or was necessary.

In 16 Cyc., 805, quoting from *Bigelow on Estoppel*, 603, it was said:

“While waiver is not in the proper sense of the term a species of estoppel, yet where a party to a transaction induces another to act upon the reasonable belief that he has waived or will waive certain rights, remedies or objections, which he is entitled to assert, he will be estopped to insist upon such rights, remedies or objections to the prejudice of the one misled.”

In *Dickerson v. Colgrove*, 100 U. S., 578, 580, the court in discussing the doctrine of estoppel *in pais* said:

“The law upon the subject is well settled. The vital principle is, that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice. It is available only for protection and cannot be used as a weapon of assault. It accomplishes that which ought to be done between man and man and is not permitted to go beyond this limit.”

On the question of inconsistent positions, the general rule is stated in 16 Cyc., 785; that where a person has with knowledge of the fact acted or conducted himself in a particular manner or asserted a particular claim, title or right, he cannot afterwards assume a position inconsistent with such act, claim or conduct, to the prejudice of another. It is upon this principle, that the person is said to be estopped of taking advantage of his own fraud or wrong. And in the same work at page 791 it was said, that where a person, with actual or constructive knowledge of the facts, induces another by his words or conduct to believe that he acquiesces in, or that he will offer no opposition thereto, that the other in reliance on such belief alters his position, such person is estopped from repudiating the transaction to the other's prejudice.

In *Insurance Co. v. Norton*, 96 U. S., 234, 243, this language was quoted with approval:

“After a forfeiture of a license to gather minerals off a manor had been incurred, the landlord entered into negotiations with the licensee and his son to grant to the latter a renewal of the license when it should expire, and terms were agreed upon which the landlord afterwards refused to carry out. It was held that by entering into these negotiations he waived the forfeiture of the original license. The negotiations assumed that the original license was to continue to its termination.”

And in *Casey v. Galli*, 94 U. S., 673, 680, it was said:

“Parties must take the consequences of the posi-

tion they assume. They are estopped to deny the reality of the state of things which they have made appear to exist and upon which others have been led to rely. Sound ethics require that the apparent in its effects and consequences should be as if it were real, and the law properly so regards it."

The same principle is found in many other cases, among them being:

McClelland v. Rush, 24 Atl. (Sup. Ct. Pa.), 354.

Long, Admr. v. Stafford, 8 N. E. (N. Y.), 522.

Southern Ry. Co. v. People, 228 Fed., 853.

Sheppard v. Rosenkrans, 85 N. W. (Wis.), 199.

Domestic Bldg. Assn. v. Guadiano, 195 Ill., 222;
63 N. E., 98.

The record of Mackey's own testimony shows that his purpose in going to Great Falls was to consider the proposition for a new lease. Why did he request and receive an introduction to the superintendent at Great Falls for the purpose of inspecting the mine, if it was not to enable him to give further consideration to appellant's offer? All of the witnesses agree that the offer was made and considered at the meeting in Chicago and left for further negotiations to be taken up after Mackey reached Great Falls.

II.

THE CONTRACT, COULD NOT BE SPECIFICALLY ENFORCED IN EQUITY AT THE SUIT OF APPELLANT, AND APPELLEE THEREFORE WAS NOT ENTITLED TO SPECIFIC PERFORMANCE BECAUSE OF LACK OF MUTUALITY OF REMEDY UNDER THE CONTRACT.

It is a general rule of law that if a contract for any reason is incapable of being enforced against one party to it, that such party is equally incapable of enforcing it specifically against the other though its execution at the suit of the latter might be free from the difficulty attending its execution at the suit of the former. If appellant could not ask specific performance of the contract in question, against appellee, the latter cannot ask that the contract be specifically enforced against appellant.

By the terms of the contract of June 15, 1909, appellee agreed to convey to appellant that certain leasehold interest acquired by appellee from the Great Northern Railway Company on June 22, 1908. (Rec., 62.) The said lease contained a provision against assignment without the consent of the lessor (Rec., 82), as follows:

“The lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the lessor, its successors or assigns thereto.”

If appellant, under the contract of June 15, 1909, had elected to buy the property therein mentioned, and had tendered the purchase price to appellee and the latter

had refused to convey the property in accordance with the terms of the contract, could the court at the suit of appellant specifically enforce the contract against appellee? This question is to be determined by the terms of the contract, and if answered in the negative, then it follows that the bill of complaint to specifically enforce the contract in this case must be dismissed.

It is clear that a court of equity could not compel the Mackey Wall Plaster Company to obtain the written consent of the Great Northern Railway Company consenting to the assignment of the lease of June 22, 1908, to the United States Gypsum Company; nor could the court decree that the Great Northern Railway Company give such consent. The Great Northern Railway Company was not a party to the contract of June 15, 1909, and the court would have no jurisdiction to require it to do anything concerning said leasehold interest in an action between the United States Gypsum Company and the Mackey Wall Plaster Company. Upon such a record the courts have held, that a bill for specific performance will not lie.

In *Marble Co. v. Ripley*, 77 U. S., 339, 359, Mr. Justice Strong in delivering the opinion of the court, on the question of mutuality said:

“And it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other, though its

execution in the latter way might in itself be free from the difficulty attending its execution in the former.”

We also call the court’s attention to *Norris v. Fox*, 45 Fed., 406, 407, wherein the same rule was adopted. In that case at the time a contract was executed to convey title to certain Kansas land, the title to the land was not in the contracting party. Norris, who agreed to convey the land, subsequently obtained a deed from Robins and wife to Fox, but the latter refused to accept the same or comply with the contract, whereupon a bill for specific performance was filed. The court said:

“Specific performance cannot be enforced in this instance for want of mutuality in the contract, so far as the remedy for its enforcement is concerned. The rule is fundamental that a contract will not be specifically enforced unless it is obligatory on both parties, nor unless both parties at the time it is executed have the right to resort to equity for its specific enforcement. *Marble Co. v. Ripley*, 10 Wall. 340; *Bodine v. Glading*, 21 Pa. St. 50; *Duvall v. Myers*, 2 Md. Ch. 401; *German v. Machin*, 6 Paige 288; *Boucher v. Vanbuskirk*, 2 A. K. Marsh, 345; *Duff v. Hopkins*, 33 Fed. Rep. 599-608. And where a contract when executed is not specifically enforceable against one of the parties, he cannot, by subsequent performance of those conditions that could not be specifically enforced, put himself in a position to demand specific enforcement against the other party. *Hope v. Hope*, 8 DeGex, M. & G. 731-736; Fry, Spec. Perf. (3d Ed., Amer. Notes), § 443. In the case at bar the agreement of Norris to procure a warranty deed of land at the time belonging to another, was of that nature

that only an action at law would lie for a breach of the agreement. As Fox could not compel specific performance of the contract when made, and only had his remedy at law by a suit for damages, the complainant must resort to the same remedy."

At the time the contract was to be performed in that case Norris had in fact procured a deed of the property to the other contracting party. The court, however, held that he could not by such act create the right to specifically enforce the contract when the contract as made was subject to the objection, that it could not be mutually enforced.

In *Stanton v. Singleton*, 126 Cal., 657, 59 Pac., 146, 147, 148, an action was brought to compel the specific performance of a contract. It was said:

"In our opinion, the contract is one which does not allow a mutuality of the remedy of a decree of specific performance, and is not, in its nature, a contract which a court of equity would undertake to enforce specifically at the suit of respondents; and it is settled law that a contract will not be specifically enforced unless its character be such that either party to it could have it specifically enforced as against the other. *Cooper v. Pena*, 21 Cal. 404, and cases there cited; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Anson v. Townsend*, 73 Cal. 418, 15 Pac. 49; *King v. Gildersleeve*, 79 Cal. 504, 21 Pac. 961; *Banbury v. Arnold*, 91 Cal. 608, 27 Pac. 934; Pom. Cont. (2d Ed.) § 162. In *Cooper v. Pena*, *supra*, the court states the principle in this language: 'The remedy must be mutual as well as the obligation, and, where the contract is of such a nature that it can-

not be specifically enforced as to one of the parties, equity will not enforce it against the other.' Therefore, waiving all other questions, if the obligations of appellant as a party to the contract (assuming that he incurred any) are not such as would be specifically enforced by a court of equity at the suit of respondents, then, under the principle and authorities above stated and referred to, this action cannot be maintained. And it is quite clear that his obligations were of that character.

Appellant contends that *Cooper v. Pena, supra*, which is a leading case on the general subject, and has been frequently cited, should not be taken as authority here, because the obligation of plaintiff there was for expressly designated personal services. But *Cooper v. Pena* is cited mainly to the point that there must be 'a mutuality of remedy'; and, if there be not such mutuality,—no matter from what cause,—the principle declared in that case applies."

In *Pacific Electric Ry. Co. v. Campbell-Johnson, et al.*, 153 Cal., 106, 94 Pac., 623, 625, 626, the court said:

"If the court was right in holding that the plaintiff was not entitled to such specific performance for lack of mutuality of remedy under the contract sued on, that is the end of the action as far as this appeal is concerned, and we think the ruling of the court below in sustaining the demurrer on that ground was correct.

It is well settled general doctrine that specific performance of a contract at the instance of one of the parties to it will not be enforced in equity, unless the contract is of such obligatory nature upon both parties that, at the suit of either against the other, the court would decree specific performance. * * *

The remedy of specific performance must be mutual, and the test of mutuality of remedy is applied by considering whether the agreement under which the remedy is asserted is of such a character that, at the suit of either, a court of equity would decree specific performance against the other. In applying this test, if it appears that the right to this remedy is not reciprocal, it is not available to either party to the contract. When there is no such mutuality of remedy equity refuses to interfere, and leaves the parties to assert their rights under the contract in a court of law. * * *

And reiterating and sustaining the doctrine of *Cooper v. Pena* in its application to different contracts where specific performance was sought, but denied for want of mutuality of remedy, are *Anson v. Townsend*, 73 Cal. 418, 15 Pac. 49; *Stanton v. Singleton*, 126 Cal. 657, 59 Pac. 146, 47 L. R. A. 334; *Los Angeles, etc. Co. v. Occidental Oil Co.*, 144 Cal. 533, 78 Pac. 25."

In *Ten Eyck v. Manning*, 27 Atl. (N. J.), 900, 901, the parties entered into a written contract by which complainant agreed to convey to defendant certain lands, and the defendant agreed to convey to complainant a farm and assign to him certain goods and chattels. At the time the contract was made complainant's wife was the owner of the land which he agreed to convey. The defendant refused to perform the contract and complainant sought to compel specific performance thereof. The court said:

"Of the many defenses set up, only one need be considered, and that is that the contract which the complainant asks to have enforced does not give to the defendant a right to the same remedy against

the complainant which the complainant seeks against the defendant; in other words, that this court could not, on the defendant's application, compel the complainant to specifically perform the contract. The remedy by specific performance is not a matter of strict right, but of sound judicial discretion, and will be granted or denied, as the justice and right of the particular case shall seem to the court, on full consideration of the rights and equities of the parties, to require. The enforcement or denial of this remedy is regulated by certain well established principles, one of which is that it will not be granted, as general rule, in cases where mutuality of obligation and remedy does not exist; or, stated in another form, mutuality of remedy is essential to the maintenance of a suit for specific performance. * * *

The precise question raised here has already been decided. *Luse v. Deitz*, 46 Iowa 205, is in all material respects precisely like the case under consideration. There, as here, a husband agreed to exchange land belonging to his wife for land of the defendant, and there, as here, the defendant, on tender of a deed executed by the husband and the wife, refused to make a conveyance to the husband, and the husband then brought an action for specific performance. Relief was denied on the ground that the right to the remedy sought was not reciprocal. The court, after declaring that the want of mutuality in remedy constituted an insurmountable obstacle in the way of decreeing specific performance, added: 'The fact that Luse tendered to Deitz a deed in due form executed by himself and his wife does not affect the case. The objection still exists that Deitz could not have enforced performance against Luse, if Luse and his wife had been unwilling to convey. If a

party who is not bound to specifically perform may, by tendering performance, enforce a specific performance against the other party, he may, at his option, enforce the specific performance of any contract, though not bound to like performance himself.' I think it is thus made plain that the complainant must be denied relief in conformity to both principle and precedent."

It will be observed that the rule was applied in that case upon the express grounds that complainant on the application of the defendant could not be compelled by any court to specifically perform the contract, and the fact that complainant had tendered a deed signed by his wife did not alter the case.

We also call the court's attention to the case of *Putnam v. Grace*, 37 N. E. (Mass.), 166, 168. In this case the American Protective League held a lease from Grace for a term of twelve years, wherein it was provided that the premises were not to be underlet without the written consent of the lessor. The Protective League came into the hands of the plaintiff as receiver and the lease was sold by order of court to the defendants, Bradstreet and Bennett, but Grace's consent in writing was not obtained. This suit was brought by the receivers for specific performance of the contract of sale. The court said:

"What has heretofore been said relates to the construction of the contract, but there is another phase of the case, relating more especially to the remedy. If the form of the contract is such that the defendant has bound himself absolutely, but the plaintiff has

not bound himself, a court of equity is slow to lend its aid to enforce such a contract in favor of the party who is not bound. If, at the time of bringing his bill, the plaintiff was not bound to convey a court of equity will not ordinarily compel a defendant, under such circumstances, to accept a title. There must be a mutuality of obligation, or the court refuses to interfere. See 2 Beach. Mod. Eq. Jur. §§ 585-587; *Butman v. Porter*, 100 Mass. 337; *Marble Co. v. Ripley*, 10 Wall. 339, 359; *Wylson v. Dunn*, 34 Ch. Div. 569, 577, 578. The consent of Mr. Grace not having been obtained, there never was a moment prior to the filing of this bill when the plaintiff was bound to assign the lease to the defendants. If it had so happened that the defendants were willing to take their chances in respect to Grace, but the plaintiff wished not to assign the lease, the defendants could not have compelled him to do so. The provision, 'subject to obtaining the assent of Mr. Grace,' would protect him. Under such circumstances the plaintiff is not entitled to the assistance of a court of equity. It does not avail the plaintiff to say that Grace's consent may be compelled by a decree in this case. The question is, were the defendants bound, at the time of filing the bill, to accept the title? See *Ely v. McKay*, 12 Allen 323; Beach, Mod. Eq. Jur. § 585, and cases cited. For these reasons the demurrers must be sustained."

Many other cases could be cited by us in support of this rule, but we deem it unnecessary. The rule goes to the form of the contract, and if by the terms of the contract specific performance cannot be given to both parties thereto, it cannot be given to one of them. The con-

tract by its terms obligated appellee to convey the lease and to procure the consent of the Railway Company to such conveyance. It was therefore in form, such a contract as could not be specifically enforced.

III.

IT WAS NECESSARY UPON APPELLEE'S THEORY OF THE CASE, FOR IT TO OBTAIN THE WRITTEN CONSENT OF THE GREAT NORTHERN RAILWAY COMPANY TO AN ASSIGNMENT OF THE LEASE, BEFORE IT COULD MAINTAIN ANY CAUSE OF ACTION AGAINST APPELLANT.

Upon the trial of the case complainant made no showing, that it had procured and delivered to appellant the written consent of the Railroad Company to an assignment of the lease. On the contrary thereof, it was shown that no such assignment had been procured or tendered to the United States Gypsum Company. Mr. Knode testified, that appellant had not received any such consent either from appellee or from anyone else. (Rec., 144.)

The rule is stated in Fry on Specific Performance, Sec. 922, as follows:

“With regard to the matters to be done by the plaintiff according to the terms of the contract, it is from obvious principles of justice incumbent on him when he seeks the performance of the contract to show, first, that he has performed or been ready and willing to perform the terms of the contract on his part to be then performed; and secondly, that he is ready and willing to do all matters and things on his

part thereafter to be done; and a default on his part in either of these respects furnishes a ground upon which the action may be resisted.”

And in Pomeroy on Specific Performance, Sec. 323, it is said:

“It is the fundamental doctrine upon which the specific enforcement of contracts in equity depends that either of the parties seeking to obtain the equitable remedy against the other, must as a condition precedent to the existence of his remedial right show that he has done or offered to do or is then ready and willing to do all the essential and material acts required of him by the agreement at the time of commencing the suit, and also that he is ready and willing to do all such acts as shall be required of him in the specific execution of the contract according to its terms. * * * In accordance with this doctrine it is a familiar rule that the vendor as plaintiff cannot enforce a specific performance upon the purchaser unless he is able to give a good title to the subject matter which he has contracted to convey.”

The same rule was laid down in *Electric Secret-Service Co. v. Gill-Alexander Elec. Mfg. Co.*, 28 S. W., 486; *Clark v. Hutzler*, 30 S. E., 470; *Cornell v. Andrus*, 36 N. J. Eq., 321; *Lindsey v. Humbrecht*, 162 Fed., 548, 555; and *Walsh v. Barton et al.*, 24 O. St., 28, 40.

The cause was submitted to the court upon such a record, and taken under advisement. The court held (Rec., 207), that it would not decree specific performance of the contract without the written consent of the Railroad Company to the lease of June 22, 1908, but in a most un-

usual manner, and, as far as we are able to determine, without precedent, stated in its opinion the following:

“If, within thirty days, plaintiff secures the railway lessor’s consent to the assignment or a discharge of the covenant and in all else is ready and able to perform, it shall have decree as prayed. Otherwise decree for defendant.”

If our construction of the contract is right, and we think it is, that it lacked mutuality of remedy, it was not such a contract as could be specifically enforced. On the other hand, if appellee was entitled to specific performance by obtaining the written consent of the Railway Company, it was necessary for it to show, that it had obtained such consent before it could have any cause of action against appellant for specific performance. It was, under the circumstances, one of the essential and material acts required of appellee by the agreement at the time of the commencement of the suit, as stated in the authorities above cited. Without the written consent, the bill in specific performance was prematurely filed, and the obtaining of the consent, and tendering it to appellant after the bill was filed, and in fact after all the evidence was heard, could not cure the defect. Furthermore, the court could not extend the time of performance by appellee, or force a contract upon appellant, other than that as made.

The contract of June 15, 1909, provided for performance by appellee at the time the first payment became due thereunder, which, by the terms of the supplemental

agreements, was July 6, 1916. The court by its action in the premises extended the time for performance by appellee for more than one year and three months. By such action it held that although appellant had no right to the leasehold until appellee procured the written consent and delivered it, it could wipe out almost a year and a half of the lease, during a time when by the court's own conclusion, appellant had no right to take and operate the mill. The only reason offered by the court for so doing is found in the language of the opinion, that time was not of the essence of appellee's conveyance, for which it had a reasonable time. We recognize the rule, but we have found no case where complainants' right to file the bill was recognized before he had made or tendered the conveyance, nor has the rule any application where, by failing to convey, the buyer is held out of the premises, because of the right of a third party to refuse to permit him to occupy the same. By attempting to apply that rule to this situation, appellee could file a bill for specific performance at a time when appellant could not take possession of the property, and could thereby absolutely destroy and remove approximately one and a half years of the leasehold interest. We cannot agree with the trial court that such is the law, nor can it be said that after almost a year and a half of the term of the lease had elapsed, that appellee conveyed within a reasonable time.

I V.

THE PROCEEDINGS HAD SUBSEQUENT TO THE SUBMISSION OF THE CASE TO THE COURT WERE ERRONEOUS, NOR DID ANYTHING DONE THEREBY OVERCOME THE DEFECTS WHICH EXISTED AT THE TIME THE BILL OF COMPLAINT WAS FILED.

As shown above, the court found that appellee had failed to sustain its right to specific performance upon the trial of the cause, but in its opinion said, that if appellee would secure the consent of the Railway Company to an assignment of the lease or a discharge of the covenant within thirty days it would enter a decree as prayed in the bill of complaint. Following the statement made in the opinion, appellee presented to the court on September 4, 1917, an instrument in writing (Rec., 177) purporting to be the consent of the Great Northern Railway Company signed by R. I. Farrington, its second vice president. The instrument provided that the Great Northern Railway Company

“does hereby consent to the subleasing of said premises by said lease to the United States Gypsum Company, its successors and assigns, and does likewise consent to the granting by said Mackey Wall Plaster Company to said Gypsum Company of an option to purchase all the rights of said Mackey Wall Plaster Company under and by virtue of said lease first above mentioned, and to the assignment of said lease first above mentioned by said Mackey Wall Plaster Company to said Gypsum Company, its successors and assigns, if the same shall be purchased pursuant to said option.”

It was undated, without the seal of the company, and there was no showing, that it was signed by authority on behalf of the Great Northern Railway Company. Appellant objected to a decree upon any such showing, and the court thereupon rendered a memorandum opinion (Rec., 208), wherein it was stated:

“Under the circumstances plaintiff will be allowed to supply defects, if it can, within thirty days. Title must meet the requirements of the law of specific performance, or not decreed”;

following which appellee moved for permission to take certain depositions (Rec., 213) supported by an affidavit (Rec., 211), which depositions the court authorized, conditioned upon giving appellant five days' notice of the time and place of taking the same. This action was in express violation of *Rule 47 of “Rules of Practice in Equity”* prescribed by the Supreme Court, as follows:

“The court upon application of either party, when allowed by statute or for good and exceptional cause for departing from the general rule to be shown by affidavit, may permit the deposition of named witnesses * . * . Those of the plaintiff within sixty days from the time the cause is at issue, those of the defendant within thirty days from the expiration of the time for the filing of plaintiff's depositions, and rebutting depositions by either party within twenty days after the time for taking original depositions expires.”

There was no order entered reopening the cause for further evidence, nor was the time extended for taking further evidence by the parties, and there was no show-

ing "of good and exceptional cause for departing from the general rule," that the evidence should be taken in open court. The only reason offered for taking the depositions was, that it had become necessary, and that the persons whose depositions were sought resided at St. Paul in the State of Minnesota. Objection was made on behalf of appellant to the entry of the order, to the taking of the depositions, and to receiving the same in evidence (Rec., 184) because violative of the rules of practice in equity. If these rules mean anything they should be enforced.

The depositions of Robert I. Farrington and L. E. Katzenbach were taken pursuant to the order above mentioned. Mr. Farrington testified, that he was a director and second vice president of the Great Northern Railway Company throughout the month of June, 1909; that he was elected a director of the company April 20, 1901, and served continuously as such until May 27, 1912; that he signed Plaintiff's Exhibit "A" being the consent above mentioned. (Rec., 185-186.) But it did not appear when he signed it, and the instrument itself was without date. By the deposition of Mr. Katzenbach the witness was allowed to testify to the contents of the records of the Railway Company, showing the election of Mr. Farrington as an officer of the company, and his authority as such officer as prescribed by the by-laws of the company. The evidence was objected to on the ground that it was incompetent. (Rec., 186-187.) The only competent evidence of the facts sought to be shown

by Mr. Katzenbach were the records thereof and that such records were properly kept. The testimony of a witness, who said he had no personal knowledge of the records preceding the date of his employment in January, 1912 (Rec., 192) could not be competent to prove the records of the corporation, much less their contents, during a period when the witness had no knowledge thereof. It was not necessary to object to such evidence at the time the deposition was taken, since the objection did not go to the form of the proof, but to the competency of the evidence. And aside from the question of receiving the evidence, it offered no legal proof of the facts sought to be established thereby. It follows, that by these depositions appellee, failed to prove the authority of Farrington to sign the instrument in question; failed to prove, that the consent was signed by Farrington when he was vice president, as they did not show upon what date it was signed; and failed to prove any delivery of the said instrument, since there was no evidence therein of delivery by the Railway Company.

When the depositions were returned to court appellee was permitted, over the objection of appellant, to offer further evidence. R. J. Reynolds testified that he was a clerk in the legal department of the Great Northern Railway Company in the office of Veazie & Veazie at Great Falls, Montana; that they were division counsel for said railway; that at the dictation of Mr. I. Parker Veazie, Sr., he prepared the consent "Exhibit A," being the instrument signed by R. I. Farrington.

(Rec., 193-194.) He said he mailed the original and duplicate to the general traffic manager at St. Paul, Minnesota, and received a reply dated June 12, 1909, prior to the execution of the lease and option between the Mackey Wall Plaster Company and the United States Gypsum Company, in which reply it was stated (Rec., 196-197):

“I enclose herewith copy of this document duly executed by the Great Northern Railway and have sent the other copy of same to Mr. Avery, president of the Gypsum Company, at Chicago.”

Not only was this evidence taken in violation of the rules of practice in equity, but it was incompetent to prove delivery of the instrument to the United States Gypsum Company if it is claimed that delivery was shown thereby. The letter of June 12th could not bind the United States Gypsum Company, nor could the delivery of the written consent to Veazie & Veazie, counsel for the Railway Company, constitute delivery of the instrument. It is true the letter says that a copy of the instrument was sent to Mr. Avery. There was no letter to Mr. Avery, or copy of a letter, showing that it was in fact sent, nor could such a statement bind appellant, nor was it competent evidence or legal proof of the fact. The record, therefore, contains no proof, that the consent was delivered to the United States Gypsum Company.

The further deposition of Mr. Hoover shows that the consent was received by Veazie & Veazie, found in their

file, and had never been delivered. The delivery of the instrument, according to the testimony of the witness Hoover, was made to the Mackey Wall Plaster Company, and took place on August 27, 1917, as follows (Rec., 198):

“After a conversation with Mr. Veazie he went to his private files and produced a file concerning the matter between the United States Gypsum Company and the Mackey Wall Plaster Company. He produced from the file and handed to me the consent, ‘Plaintiff’s Exhibit A,’ which is attached to Mr. Farrington’s deposition, and stated that the consent had been given long prior to this time *for the purpose of being delivered to the Mackey Wall Plaster Company and that he would then deliver it.*”

It may be contended by appellee, that the record shows that Veazie & Veazie were also attorneys for the United States Gypsum Company. But the record is clear, that they were only attorneys for it in the matter of preparing the lease and option (Rec., 194) and that they were acting in their capacity as counsel for the railroad in obtaining the consent, is shown by the statement that they received it to deliver the same to the Mackey Wall Plaster Company, and undertook to deliver it to Mr. Hoover as attorney for that company. They could not have been acting for appellant under these circumstances.

We contend that it was too late to bind the railway company by the delivery of a consent, signed by a man who did not then hold any office with the Railway Company,

and which had remained undelivered from the time of its receipt until the date last above mentioned. The authority of Veasie & Veasie to deliver the instrument was not shown, nor was it shown that the Railway Company consented to be bound thereby. The original option had long since expired, and a new contract had been made on July 6, 1915. Such a delivery could not under any circumstances bind the Great Northern Railway Company. We do not think that a court of equity should compel appellant to take a title based upon such a flimsy foundation.

It has frequently been held, that a court will not force upon the vendee in specific performance a title which will compel him to defend it in the courts. Is it possible that any lawyer would pass the title of the lease in question to the United States Gypsum Company based upon an instrument signed by a vice president of the company, undated and without seal, and delivered at a date many years after the original option expired and subsequent to the time when such vice president ceased to have any connection with the Railway Company? It would, indeed, place appellant in a difficult position, if the Railway Company should claim, that the consent so delivered by Veazie & Veazie was not binding upon it.

In *Stapylton v. Scott*, 33 Eng. Rep. (Full Rep.), 988, the court said:

“The course has, however, varied entirely and it has been held repeatedly that though in the judgment of the court the better opinion is that a title can be made, yet if there is a considerable, a rational

doubt, the court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law. The first modern case of that sort was, I believe, *Shapland v. Smith*; (1) in which Mr. Hett differed from Baron Eyre; and the opinion of the former was confirmed by Lord Thurlow; who however felt the doubt so forcibly, that he refused a specific performance; and unquestionably in many instances since that time it has been refused where there was reasonable doubt upon the title.

* * * Admitting it may be explained by extrinsic circumstances, that the testator's doubt can be accounted for, the true question is, whether this is a reasonably clear, marketable, title, without that doubt as to the evidence of it, which must always create difficulty in parting with it. I am satisfied, that it is not."

In *Sloper v. Fish*, 35 Eng. Rep. (Full Rep.), 274, 276, in a bill for specific performance it appeared that the title was subject to a judgment debt.

"Then it would be a question between them and the judgment creditor, whether, as against their lien, the judgment would be operative, and supposing it would not, what would hinder it from attaching on the estate subject to the lien? Without absolutely deciding each of these questions it is sufficient to say that there is so much of doubt upon them, that the court will not compel a purchaser to run the hazard of their decision.

It has been said, that every title is good, or bad, and the court ought to know nothing of a doubtful title, but the court has adopted a different principle of decision. * * * Therefore, as I shall not compel

this purchaser to take the title, the bill must be dismissed.”

In *Lindsey et al. v. Humbrecht*, 162 Fed., 548, 555, the court said:

“Notwithstanding this, it seems clear that in a proceeding like this, for specific performance, it would be necessary for the complainants to show that they had a good title to the land, and would be able to convey the same to Humbrecht; that is a ‘marketable title’ as it is frequently called in the books. The title should be such as not only to enable the purchaser to hold the land without question, but to sell it without difficulty if he desires.”

In the case of *McCroskey v. Ladd et al.*, 28 Pac. (Sup. Ct. Cal.), 216, 217, plaintiff sought to compel defendants to accept a title resting on adverse possession. The flaw in the paper title consisting in the lack of proper averments, and of corporate seal, in a deed purporting to be executed by a corporation, the court said:

“In the cases of this kind, a title, to be good, must be one which is ‘free from litigation, palpable defects, and grave doubts; should consist of both legal and equitable titles; and should be fairly deducible of record.’ *Turner v. McDonald*, 76 Cal. 180, 18 Pac. Rep. 262. The question as to whether or not the vendor has acquired a perfect title by adverse possession is not to be considered. The purchaser is entitled to a good paper title, sufficient in law, ‘and was not bound to accept title resting upon the statute of limitations, or take the risk of determining from facts which he might learn *dehors* the record whether or not the statute of limitations could be suc-

cessfully pleaded against the adverse claim.' *Benson v. Shotwell*, 87 Cal. 56, 25 Pac. Rep. 249."

The case of *Herman v. Somers et al.*, 27 Atl. (Sup. Ct. Pa.), 1050, 1051, the court said:

"In equity a marketable title is one in which there is no doubt involved, either as to matter of law or fact. *Dalzell v. Crawford*, Pars. Eq. Cas., 45; *Nicol v. Carr*, 35 Pa. St. 382; *Swayne v. Lyon*, 67 Pa. St. 439. In *Speakman v. Forepaugh*, 44 Pa. St. 373, it was said: 'Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title, which may prove substantial—though there is not enough in evidence to enable the chancellor to say so—a purchaser will not be held to take it, and encounter the hazard of litigation.' The testimony in this case is quite sufficient to bring it within the principle recognized in these cases. * * *"

In the case of *Fisher v. Eggert*, 64 Atl., 957, 958, the court said:

"I am unable to advise a decree of specific performance in this cause because of reasonable doubts which, in my opinion, exist touching the title of complainant. This court has uniformly refused to decree specific performance by a purchaser in all cases where the title of vendor cannot with certainty be pronounced free from doubts. (Cases cited.) The cases here cited proceed upon the view that where all parties interested in a title are not before the court, and consequently are not bound by the decision, a decree of specific performance should not be made if the character of the title be doubtful, even though the court might be able to come to the con-

clusion that a title could be made by vendor that would not probably be overthrown; that if a title is to be forced upon a purchaser against his will it should be a title that will enable him not only to hold the land, but to hold it in peace, and to sell it with reasonable certainty that no flaw or doubt will disturb its marketability. In *Cornell v. Andrews*, 35 N. J. Eq. 7, 12, it is said: 'The real question to be decided in this case is whether the title which the complaint offers is a marketable one. If it is such a title as would be questionable, the court ought not to force it on the unwilling purchaser, even though in its opinion, it would, on litigation, be sustained.' "

In the case of *Daniel v. Shaw*, 44 N. E. (Sup. Ct., Mass.), 991, a bill was brought by plaintiff for the specific enforcement of a contract for the purchase of real estate. The relief sought was denied. The facts appear in the opinion set out below:

"The defendant contends that the plaintiff is not able to offer him a good title, by reason of the provisions of St. 1891, c. 323, as amended by St. 1892, c. 418, and the acts of the board of survey of the City of Boston thereunder. The plaintiff concedes that his title is not good if the statute is constitutional. The parties also differ in their construction of the statute. The City of Boston is interested in both of these questions. It has been allowed to file a brief, but it is not a party to the record, and would not be precluded from litigating the same questions anew if our decision in the present case were for the plaintiff. The defendant would be exposed to the chance of such litigation if compelled to accept the title now offered. By the concession of the plaintiff,

the statute, if constitutional, creates an incumbrance on his title. The plaintiff asks us to declare his title good by declaring the statute unconstitutional. The defendant ought not to be compelled to accept such a title. (Cases cited.)”

In *Fleming v. Burnham*, 100 N. Y., 1, 9, the court said:

“But the question presented to the court on an application to compel a purchaser on a judicial sale, who raises objections to the title tendered, to complete the purchase, is not the same as if it was raised in a direct proceeding between the very parties to the right. Where all the parties in interest are before the court, and the court has jurisdiction to decide, they are concluded by the judgment pronounced, so long as it stands unreversed. * * * But the court stands in quite a different attitude where it is called upon to compel a purchaser to take title under a judicial sale, who asserts that there are outstanding rights and interests not cut off or concluded by the judgment under which the sale was made. The objection may involve a mere question of fact, or it may involve a pure question of law upon undisputed facts. In either case it may very well happen that the question is so doubtful that, although the court would decide it upon the facts disclosed, in a proceeding where all the parties interested were before the court, nevertheless it would decline to pass upon it in a proceeding to compel a purchaser to take title, and would relieve him from his purchase. The reason is obvious. The purchaser is entitled to a marketable title. A title open to a reasonable doubt is not a marketable title. The court cannot make it such by passing upon an objection depending on a disputed question of fact, or a doubtful question of

law, in the absence of the party in whom the outstanding right was vested. He would not be bound by the adjudication, and could raise the same question in a new proceeding.”

Wesley v. Eells, 177 U. S., 370, 376, was a suit for specific performance of a contract to purchase real estate. The court therein said:

“In *Hennessy v. Woolworth*, 128 U. S. 438, 442, this court said: ‘Specific performance is not of absolute right. It rests entirely in judicial discretion, exercised, it is true, according to the settled principles of equity, and not arbitrarily or capriciously, yet always with reference to the facts of the particular case.’ * * *

Again, it is a settled rule of equity that the defendant in a suit brought for the specific performance of an executory contract will not be compelled to take a title about which doubt may reasonably exist or which may expose him to litigation. *Morgan’s Heirs v. Morgan*, 2 Wheat. 290, 299, 301; *City of Tiffin v. Shawhan*, 43 Ohio St. 178, 183. And, speaking generally, a title is to be deemed doubtful where a court of co-ordinate jurisdiction has decided adversely to it or to the principles on which it rests. *Fry on Specific Performance*, 3d ed. Sec. 870, and authorities there cited. One of the grounds upon which a decree for specific performance was denied in *Hepburn v. Auld*, 2 Cranch, 262, 278, was that it would impose upon the defendant the necessity of bringing a suit to perfect his title.

The principle is well illustrated in *Jeffries v. Jeffries*, 117 Mass. 184, 187, which was a suit for the specific performance of a written agreement for the purchase of certain real estate. One of the objec-

tions to the title was that it was incumbered by conditions that would interfere with the enjoyment of the property. The Supreme Judicial Court of Massachusetts there said: 'Hence the propriety and the necessity of the rule in equity that a defendant, in proceedings for specific performance, shall not be compelled to accept a title in the least degree doubtful. It is not necessary that he should satisfy the court that the title is defective so that he ought to prevail at law; it is enough if it appear to be subject to adverse claims which are of such a nature as may reasonably be expected to expose the purchaser to controversy to maintain his title, or rights incident to it. *Richmond v. Gray*, 3 Allen 25; *Sturtevant v. Jaques*, 14 Allen 523; *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400. He ought not to be subjected, against his agreement or consent, to the necessity of litigation to remove even that which is only a cloud upon his title.' So in *Lowry v. Muldrow*, 8 Rich. Eq. 241, 247, the court said that on bills for specific performance of contracts concerning lands, 'courts of equity do not force the purchasers to take anything but a good title, and do not compel them to buy lawsuits.' Numerous other American cases announce the same rule."

In this case appellee by doubtful evidence has sought to establish the execution and delivery, as binding upon the Great Northern Railway Company, of the consent in question. The Great Northern Railway Company was not a party to this suit and was not bound by anything held as to the consent. Any consent, short of the present acknowledged act of the Railway Company, ought not to be accepted in satisfaction of the rule requiring a title

free from question. Why did appellee try its case first without any consent, second without obtaining a present acknowledged consent, and third without any evidence by any official of the road that the consent produced was ratified and approved? The evidence of the unqualified consent of the Railway Company, if it did consent, was available, and in an action for specific performance, appellee should not be allowed to offer a title subject to question, when evidence to free the title from question was in fact available. No lawyer would accept the title offered, under these circumstances.

In conclusion, we direct attention to the fact that the trial court not only held that the consent introduced by appellee was sufficient, but assessed interest against appellant as of date of July 6, 1916, at the rate of 8 per cent. on the cash installment and 5 per cent. upon said notes. If appellee was not entitled to a decree at the time the bill was filed and the case originally tried, because it had not tendered a sufficient conveyance, no interest should have been charged against appellant. The contract provided, that the first installment of the purchase price was to be paid and the notes executed at the time appellee conveyed the premises to appellant. As shown, there could be no transfer of the lease without the written consent of the Railway Company, and until it was obtained and tendered to appellant no interest could accrue upon the purchase price of the premises. It was error for the court to assess

interest against appellant on July 6, 1916, and to direct the execution of said notes to be dated July 6, 1916.

Respectfully submitted,

SCOTT, BANCROFT, MARTIN & STEPHENS,

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JOHN E. MACLEISH,

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Of Counsel.

No. 3111.

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES GYPSUM COMPANY,
a corporation,

Appellant,

vs.

THE MACKEY WALL PLASTER COMPANY,
a corporation,

Appellee.

BRIEF FOR APPELLEE

COOPER, STEPHENSON & HOOVER,

Attorneys for Appellee.

Filed May....., 1918.

.....Clerk.

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BRIEF FOR APPELLEE

STATEMENT OF THE CASE.

This is an action for specific performance of an option contract to purchase certain property and property rights in Cascade County, Montana.

On the 15th day of June, 1909, the Mackey Wall Plaster Company entered into a lease with United States Gypsum Company (Trans. p. 56 et. seq.). The lease also contained an option to purchase, which is contained in Paragraph Thirteenth thereof (Trans. p. 72). By this option the Gypsum Company obtained the right to purchase "all the property and property rights herein described for the sum of Fifty Thousand Dollars (\$50,000.00)". The

“property and property rights herein described” are contained in Descriptions “a” and “b” of the agreement (Trans. pp. 60-61). Description “b” is as follows:

“All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: Beginning at a point fifty (50) feet Northwesterly from and at right angles to the center line of the B. & M. Smelter Branch as measured from a point in the said center line 790 feet Northeasterly from its intersection with the South line of Section Two (2), Township Twenty (20) North of Range Three (3), East; thence Northeasterly parallel to the said center line 195 feet; thence North along the East boundary line of the right of way of the Great Northern Railway Company’s line of railroad 220 feet; thence West at right angles 200 feet to the West boundary line of the said right of way; thence Southerly along said boundary line 370 feet, thence Easterly in a straight line 175 feet, to the place of beginning; being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and the said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked ‘Exhibit Plant Lease.’ ”.

This agreement contained a provision for its extension and renewal, and by agreement dated July 1, 1910 (Trans. p. 15 et. seq.), the lease and option were extended for a period of five years; and by a still further agreement dated the 6th day of July, 1915 (Trans. p. 24), the agreements of June 15, 1909, and

July 1, 1910, were in all respects extended, renewed and made valid and of full force and effect for the further period of one year from July 6, 1915.

In this last extension a change is made in the mode of the exercise of the option.

“And as a further consideration for said extension, lessee agrees that if it shall determine that it will not avail itself of the option in said several agreements contained to purchase the property of the Lessor Mackey Wall Plaster Company upon the terms and conditions in said several instruments provided, it will, at least sixty days prior to the first day of July, 1916, give the Lessors in writing a notice to the effect that Lessee will not purchase the said property under and by virtue of said agreements; and it is agreed that if Lessee shall neglect or fail to give such notice at least sixty days before the first day of July, 1916, it will thereby become obligated to make such purchase and pay the consideration in said instruments provided to be paid in the event of purchase, . . . ”.

It is admitted by the pleadings (Trans. p. 36) that United States Gypsum Company took possession of the property so leased and enjoyed the use thereof during the term of said lease, and that it paid all the rents and did all the things required by it to be done in accordance with the terms thereof, and that it continued to occupy said premises during the term of the extensions of said lease and performed all the terms and conditions of said agreement throughout the period of said extensions.

The appellee, taking the position that the option had been exercised by appellant by failure to give the notice referred to in the agreement of July 6, 1915, upon July 5, 1916, sent to the appellant deeds

of conveyance to the property described in the agreements, which were received by appellant and returned, the appellant declining to accept the deeds and assignment for the reason that it had not purchased the property (Trans. p. 104). Thereupon this action was instituted.

The appellant takes the position that it never exercised the option; first, because of its letter dated April 19, 1916; and second, because the giving of notice of non-acceptance was waived by the conduct of appellee or that he has estopped himself to assert that such notice was never given.

Appellant further makes the contention that even if the option were exercised, the court should not compel specific performance of this agreement for the reason that appellee cannot give satisfactory title to a part of the premises agreed to be conveyed, since a portion of said premises were held under a lease from Great Northern Railway Company to the Mackey Wall Plaster Company (Trans. p. 79), which lease contains the usual provision against assignment or sub-letting without the consent of lessor (Trans. p. 82) and that no satisfactory consent had been made by the Great Northern Railway Company.

ARGUMENT.

I.

The Option Was Exercised.

The method of exercising the option as contained in the agreement dated July 6, 1915 (Trans. p. 25), is unique. It places the burden upon the appellant to give appellee a notice in writing at least sixty days before July 1, 1916, if it does not avail itself of the option, and if it shall neglect or fail to give such notice at least sixty days before the 1st of July, 1916, it will thereby become obligated to make such purchase. The terms of this option were clearly understood by the parties thereto as is further evidenced by the letter dated July 14, 1915 (Trans. p. 28), whereby the Mackey Wall Plaster Company makes clear to the United States Gypsum Company "that in case you fail to notify us of your election not to purchase on or before sixty days prior to the first day of July, 1916, then you shall be held to have elected to exercise the option of purchase contained in said contracts, and we shall thereupon become obligated to convey to you, in manner as set forth in said contract of June 15, 1909, all of the properties . . . "; and such letter further provides that the notice contemplated "shall be sufficient if deposited in the United States mails, postage prepaid, enclosed in an envelope addressed to either of us at the City of Great Falls, County of Cascade, State of Montana."

There is no effort upon the part of the appellant to make out a case of surprise or mistake. The evi-

dence is too plain that the officers of appellant at all times had clearly in mind the peculiar form of this option and the form of the notice that was required to be given if they should determine not to buy the property.

Upon April 19, 1916, Mr. Knode, appellant's manager, wrote a letter to Mr. A. D. Mackey, the president of appellee, at Minneapolis, Minnesota, wherein it is stated, "Expect to give you formal notice on May 5th that we do not care to purchase your property." (Trans. p. 94). Mr. Mackey testified that on April 28th in a conversation between himself and Mr. Knode, the manager of operation for appellant, the latter said: "Well, Mr. Mackey, on May 5th, or May 4th, whichever date it may be, we will send you our formal notice that we do not care to purchase your property." (Trans. p. 99.)

Bearing in mind, therefore, that although the wording of this option is unique, and although by the provisions of the agreement, the option is automatically exercised by the failure to give a written notice, there is no hardship in holding appellant to the terms of the contract when those terms were so clearly remembered by the officers of appellant at all times prior to the exercise of this option.

The only letter or writing relating to the exercise of this option which was written prior to the time fixed, is the letter of April 19, 1916, hereinbefore referred to. Appellant makes some contention that this is a notice of its election not to purchase as contemplated by the option. It is plain from the terms of the letter

itself that it was never intended to serve any such purpose. We are well aware of the rule that mere informality does not vitiate a notice where no particular form is necessary, but the objection to this letter goes not to its form but to its substance. By placing at the end of the letter the clause, "expect to give you formal notice on May 5th that we do not care to purchase your property," the appellant deliberately robbed it of any binding effect which it might otherwise have had as a notice of intention not to purchase.

In order that the effect of a written instrument upon the parties may be fully understood, it is frequently necessary to look into the circumstances surrounding its execution and the motives of the persons who make it. At the time of writing this letter, appellant had been in possession of these mining properties and the mill at Great Falls for about seven years. They had continued on, renewing the lease from time to time; and it is to be gathered from the testimony of Messrs. Knode and Nold, and is a fair assumption, that appellant had built up a steady business in the operation of these properties throughout that time. The writer of the letter of April 19th had two things in mind: he wanted if possible to obtain an extension of the lease substantially as it then existed, but at the same time did not wish to surrender any right to purchase which appellant then had in the property; he wished to induce Mr. Mackey to come to Chicago "to talk the matter over," and he wished also to hold over Mr. Mackey as a sort of threat that the appellant expected to ultimately give notice that it would

not purchase these properties. Mr. Knode testified: "My purpose in writing that letter was to get Mr. Mackey down to Chicago if he cared to come. I surmised that after the receipt of that letter Mr. Mackey would care to come to Chicago." (Trans. p. 145). And with reference to his understanding when the letter was received, Mr. Mackey says: "I smiled when I got that letter and said to myself, 'Well, that is pretty smooth.' I meant by being pretty smooth, that they had not said anything and they were left in a position to do or not do, as they might later on determine." (Trans. p. 117.)

Appellant does not now seriously contend that this letter was any kind of a notice contemplated by these contracts, but more seriously urges that by his conduct after receipt of the letter, Mr. Mackey waived the giving of written notice.

We do not take any exception to the statement of the rules relating to waiver and estoppel cited in appellant's brief, but it is respectfully submitted that the evidence in this case wholly fails to sustain appellant's contention that any such waiver or estoppel existed.

The letter of April 19th accomplished its purpose. Mr. Mackey went to Chicago, and the conversation was had between Mr. Mackey, and Mr. Knode, and Mr. Nold, who was an officer of the appellant. The testimony of all the witnesses indicates that the conversation was largely directed to the condition of the mine. It is very apparent that the officers of the Gypsum Company made every effort to belittle the quantity of gypsum contained in the Mackey mine and greatly

magnified the appellant's pretended reasons for its supposed desire not to purchase appellee's property. Mr. Mackey denies that Mr. Knode told him that appellant would not purchase the property, but states both on direct and cross-examination that the conversation was as follows: " 'Well, Mr. Mackey,' he said, 'On May 5th, or May 4th, whichever date it may be,' he says, 'we will send you our formal notice that we do not care to purchase your property.' I said, 'Well, whatever you folks decide to do, you may send to me care of Mr. Ransom Cooper.' He turned his chair to the left, opened a drawer or something,—it might not have been to his desk, but he took out of it a good-sized memorandum pad and he commenced doing some writing; as he finished his writing he said aloud 'Care of Ransom Cooper,' put his pad where he got it, turned his chair around facing me . . . ". " . . . That was the only time that Mr. Knode said that they would not purchase the property." (Trans. pp. 99 and 111.)

As we understand the law relating to waiver or estoppel, it must appear from the language or conduct of the party estopped that he did or said something reasonably calculated to lead the other party to believe that the particular act—in this case, the giving of the notice—could be dispensed with. Did Mr. Mackey say to appellant's officers, "It will be unnecessary for you to give me any written notice that you will not purchase," or did he do any act which would lead appellant to believe that such was his frame of mind? We have closely searched the record both in the testimony of Mr. Mackey and in the testimony of Mr.

Knodel and Mr. Nold, but we find it wholly wanting in any evidence of that sort.

Much stress is laid by appellant upon the fact that there were some negotiations for the extension of the lease. When the record is examined, however, as to the extent of these negotiations, it is plain that Mr. Knodel made no definite proposition even as to a lease, and it is also perfectly apparent that Mr. Mackey did nothing more than listen; and when the discussion relating to the lease had ended, Mr. Mackey said: "Put in writing whatever you folks have in your mind and send it to Mr. Cooper." (Trans. p. 114.) Mr. Mackey also testified on cross-examination, "When we were discussing the making of a new lease, I had no means of knowing what they had in mind. I was in the dark. They had a right to send that notice or they had a right not to. It was not a fact that when I left the office of the Gypsum Company, I was aware that the defendant had decided not to buy my property, if that had been their position." (Trans. p. 116). All that Mackey said or did, no matter what version of this interview is accepted, amounted to this: "Whatever you people determine to do, put it in writing." There was nothing in this to indicate that Mackey had any reason to suppose that formal notice would not follow if appellant continued in the attitude which it assumed in the letter of April 19th, and there was nothing in Mackey's attitude or comments that was calculated to lull the appellant to sleep upon any of its rights.

This situation is clearly disclosed by appellant's

letter of May 11th. This letter is a remarkable piece of workmanship and as a bold attempt at a deliberate self-serving declaration, it is entitled to high rank. (Trans. p. 136). This is the first letter that was written on either side after the conversations of April 28th, and reads as follows:

“We wrote you on April 19th last that we would not purchase the property under the agreements made on June 15, 1909, and July 1, 1910, between Mackey Wall Plaster Company, A. D. Mackey and Myra Post Mackey, lessors therein named, and the United States Gypsum Company, lessee therein named, following which we conferred with you, at which conference we advised you of our decision not to purchase the said property or to exercise the options contained in said agreements.

“With further reference to our conversation regarding your property at Great Falls and Riceville, Montana, we wish to say that in view of the difficulties connected with the mining operations at Riceville and other conditions which have entered into the situation since our renewal of the contract last July, we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein.

“We are willing, however, to enter into an extension of these contracts, whereby all of the provisions thereof are extended for an indefinite term, or, if you prefer, the contract can be extended for the term of one year subject to cancellation upon sixty days’ written notice given by us to you of our intentions to terminate the same, rental to be payable monthly in advance, instead of yearly as heretofore.”

According to Mr. Knode’s testimony, when Mr. Mackey left Chicago, he was fully convinced that he had received all the notice he was entitled to. What purpose then could it possibly serve appellant to make

the lengthy recitals in the first part of this letter? If they had told Mr. Mackey that they were unwilling to purchase the property, why did they repeat in the second paragraph of this letter, "We wish to say that . . . we are unwilling to purchase the said property mentioned in said agreements under the terms contained therein"? The first paragraph is an apparent effort to reconstruct the letter of April 19th and rechristen it a notice and make it perform the office of the formal and actual notice, which it promised. The letter of April 19th must be restated and made *nunc pro tunc* as of May 11th, to reach back as of April 19th and perform the office which on May 11th it was recognized it must have in order to be effective as a notice.

This sort of ledgerdemean finds scant favor in a court of equity. Waiver must have a substantial basis. There must be reliance on one side and acts to induce reliance on the other in order to constitute a waiver. This is entirely wanting. By the contract and by the letter of April 19th, appellee was entitled to expect a formal written notice if appellant did not wish to purchase the property. Mr. Mackey did nothing and said nothing during the entire conversation which would induce appellant to believe that he was not still expecting and entitled to this formal notice, and until such notice was given, appellee was bound by the option and contract and would clearly not have been warranted in entering into negotiations with any other person for the sale or disposal of the premises.

There are a few minor disputes in the testimony, but

as we view it, these are unimportant, and at all events have been resolved in favor of appellee by the Honorable Judge of the District Court who had the witness before him and carefully considered the testimony given.

By this letter and by these negotiations, appellant's officer was clearly and unequivocally maneuvering for a further advantage, using every means real and imaginary which could be devised to obtain it. This inference is clearly shown by the sequel for the evidence shows that after the appellant was put in a position where it is required to take this property at somewhere near its reasonable value, it then attempted to sell out Mr. Mackey's one hundred and ninety-eight shares taken one year before as security for \$8000.00 at the insignificant sum of \$99.00. (Trans. p. 149).

If it be true that appellant, after the time had gone by, did not wish to purchase these properties according to the terms of the option, and by mistake failed to give the proper notice, we can only say that this mistake was not induced by any language or conduct on the part of appellee or its officers or agents, and that it is no hardship upon appellant to take these properties according to the terms of the written agreements.

II.

The only other objections of appellant to the decree in this cause are based upon the alleged want of consent on the part of the Great Northern Railway Company to the assignment of the lease covering the property hereinbefore specifically described.

The lease was attached to and made a part of the original agreement (Trans. p. 79) and contains the following provisions against assignment and subletting:

“The Lessee shall not and will not assign this indenture nor permit any other person or corporation to use or occupy any part of the premises hereby demised without first having obtained the written consent of the Lessor, its successors or assigns thereto.”

We took the position in the court below, and it is now our contention that the Mackey Wall Plaster Company never agreed to assign this lease, in the usual form of such assignments or conveyances. The agreement in the option was to sell “all the property and property rights herein described for the sum of FIFTY Thousand Dollars (\$50,000.00).” Description “b” covers “All of the right, title, interest, and estate of the said Plaster Company in and to that certain tract of land in or near the City of Great Falls, in said county of Cascade, which is described as follows: “(Here is a description by metes and bounds) “being all of the rights in and title to said tract of land which were acquired by said Plaster Company by and through the Indenture of Lease therefor which was duly entered into between the Great Northern Railway Company and said Plaster Company on the 22nd day of June, 1908, and subject to all of the terms and conditions therein set forth, a true copy of which said Indenture of Lease is hereunto attached as part of this instrument and marked ‘Exhibit Plant Lease.’”

This contract contemplated that the Plaster Com-

pany would convey said property rights and that upon making such a conveyance, its obligations would cease. The attitude of the Plaster Company as evidenced by this contract was this: "You are to take all my rights, titles, interests, and estates in these various properties just as they stand and we will give you a warranty deed warranting that the Plaster Company has not conveyed any estate or interest in said property or created therein any property rights in favor of any other person than said Gypsum Company, etc." The lease was attached at that time. The Gypsum Company knew all the provisions in the lease and the Gypsum Company took upon itself the burden of obtaining the consent of the Great Northern Railway Company to the sub-leasing and subsequent assignment of this lease.

This interpretation of the contract is clearly sustained by the subsequent events. The Gypsum Company went into possession of the properties and continuously occupied and operated the same for over seven years before the commencement of this action. It is admitted that they performed all of the terms and conditions of the agreement, and that they paid to the Great Northern Railway Company the rental which became due under the lease throughout the entire period.

The evidence discloses that when the United States Gypsum Company and Mackey Wall Plaster Company entered into the agreement dated June 15, 1909, Messrs. Veazey and Veazey, Attorneys at Law, at Great Falls, Montana, acted as attorneys for the United States

Gypsum Company in preparing that lease and option; that a week before the original agreement was executed, Mr. Veazey prepared the consent of the Great Northern Railway Company to the sub-leasing of these premises and the subsequent assignment thereof (Trans. p. 194), and that he forwarded the consent in duplicate to the General Traffic Manager of the Great Northern Railway Company at St. Paul, Minnesota, accompanied by a letter dated June 8, 1909, which reads as follows:

“Referring to the subject discussed in your letter of May 28th, addressed to Mr. Kenney, with which you enclosed copy of letter addressed to you, under the date of May 26th, by Mr. S. L. Avery, President U. S. Gypsum Company, and copy of your reply (Which said correspondence you asked to have brought to my attention, through Mr. Jackson) we herewith enclose written consent by the Railway Company to the sub-leasing and subsequent assignment of the lease from the Railway Company to the Plaster Company, and would ask that you kindly have this paper immediately executed on behalf of the Railway Company, and forward to Mr. S. L. Avery at Chicago, advising us of your having done so and, as Mr. Mackey may feel that he should have a similar instrument in the files of his company, we send the consent in duplicate and would ask if agreeable, you will have each of these instruments signed on behalf of the Railway Company and the other sent to the Mackey Wall Plaster Company at Great Falls.”

The consent was duly executed in duplicate by the Railway Company and one copy thereof returned to Messrs. Veazey & Veazey, and received by them a day or two before the execution of the original agreement (Trans. p. 196). It was sent back together with the

letter dated June 12, 1909, from W. W. Broughton, General Traffic Manager of the Great Northern Railway Company, which reads as follows:

“Referring to your letter of the 8th, file 320, enclosing consent of the railway company to the sub-leasing and subsequent assignment of lease from the railway company to the U. S. Gypsum Company.

“I enclose, herewith, copy of this document duly executed by the Great Northern Railway and have sent the other copy of the same to Mr. Avery, President of the Gypsum Company, at Chicago.”

These transactions show beyond any doubt that the appellant accepted the construction of the contract, which we contend is the proper one, that is: that the burden of securing the consent of the Great Northern Railway Company was at all times upon the Gypsum Company, and realizing this from the nature of the instrument itself, the attorneys for the Gypsum Company refused to have the agreement signed at all until that consent had been secured. Bearing in mind also that the Gypsum Company immediately went into possession of the premises without making any further requirements of Mackey Wall Plaster Company for any consent to the sub-leasing of the premises or the subsequent sale, and continued to occupy the same and pay rent, and that later when the tender of the deed and assignment was made to them, they made no objection upon the ground that the consent of the Railway Company had not been obtained, or upon any other ground except that the option had not been exercised, the conclusion is irresistible that the Gypsum Company at all times recognized that the burden was upon it to secure the consent of the Great Northern Railway

Company and to maintain the conditions of the lease.

At the time we made this contention before the District Court (Trans. p. 172), we had not introduced the evidence of the actual procurement of the consent of the Great Northern Railway Company by the Gypsum Company, and the court, exercising an abundance of precaution, required proof of such consent before entering the decree. This is complained of by the appellant as fatal error.

The court, by the opinion of July 27, 1917 (Trans. p. 201), allowed appellee thirty days within which to secure the consent of the Railway Company or a discharge of the covenant. Within the thirty days, the consent was obtained from the files of Messrs. Veazey & Veazey (Trans. p. 198) and deposited in court. Thereupon the appellant raised objections to the sufficiency of this consent, and appellee was allowed thirty days to show that the consent was binding upon the Railway Company. Upon October 3rd the showing was made in open court upon the depositions of Mr. L. E. Katzenbach and Mr. R. I. Farrington, and upon the oral testimony of Messrs. R. J. Reynolds and W. H. Hoover. The appellant further complains that the depositions referred to should not have been admitted in evidence, and that objections to certain evidence should have been sustained.

Directing our attention first to the contention that the court erred in allowing appellee to prove the consent of the Great Northern Railway Company as a condition precedent to the entering of the decree, it is the position of appellant that the contract could not be

specifically enforced because it lacked mutuality of remedy at the outset. In view of the proof introduced and now of record in this case, this contention is entirely out of place because the proof conclusively shows that this consent was given by the Railway Company and obtained by the United States Gypsum Company prior to the signing of the original contract, so that even if mutuality of remedy at the time of the entering into of the contract should be required under the most stringent rules ever announced by the courts, this contract would fully meet the requirements of such a rule. However, counsel for appellant err in the contention that at this late date mutuality of remedy is necessary at any time before the entry of the decree in a case such as the one at bar. Mr. Pomeroy in Vol. II. *Equitable Remedies*, says:

“§769. The frequent statement of the rule of mutuality—that the contract to be specifically enforced must as a general rule, be mutual,—that is to say, such, that it might, at the time it was entered into, have been enforced by either of the parties against the other,’ is open to so many exceptions that it is of little value as a rule.”

“§772. (c) Where Plaintiff's Inability is Cured Before Decree.—A clear instance of this sort is the inability of the plaintiff to make a title, because the title is in another. The defendant may have known this at the time of the bargain. Equity will not compel him to perform before the title is in, but should the plaintiff get in the title before the decree, defendant must perform.”

“§808. It is a familiar application of the principle as to performance by the plaintiff, that the vendor cannot force performance upon the purchaser, unless he is able to give a good title to the

subject matter. Where, however, the vendor gets in the title before the decree, 'the doctrine of equity is, when time is not of the essence, a decree will be made against the purchaser, if the seller can make a good title at the time of decree, unless there has been bad faith, or an improper speculation attempted.' The weight of authority supports this rule, although there are several jurisdictions which hold that if the plaintiff could not make a good title at the time of the agreement, specific performance will be denied him on the ground of lack of mutuality. These latter cases are inconsistent with the view of the mutuality rule that is best supported by authority and on principle; since at the time of the decree the defendant is not left in any inequitable position."

"Where two parties agree to exchange lands, each agreeing to furnish good title satisfactory to both parties, but without any mention in such agreement of mortgages with which each property is incumbered, a decree for specific performance may be granted at the suit of one party notwithstanding the complaint of the other party that the one seeking to enforce the contract is unable to clear off his mortgage and give good title."

Oakey vs. Cook
41 N. J. Equity 350
7 Atl. 495.

"The authorities are, therefore, ample to establish the doctrine that the mere fact that the vendor's property is incumbered, or his title is defective, at the time the contract of sale is made, will not prevent his enforcing the contract in equity if he has removed the incumbrance, and perfected the title by the time he is required by his contract to convey it; and, generally, when he has acted in good faith, relief will be granted him, if he is ready to furnish a clear title at the time of the decree, provided the delay has not prejudiced the purchaser, and time is not the essence of the contract. If this were not so, an owner of land who has incumbrances upon

it might pay them off for the purpose of giving the purchaser a clear title, and then not be able to enforce the contract of purchase; or he might be subjected to heavy costs in order to have his title cleared, and then not be able to require the purchaser to perform his part of the contract."

Maryland Construction Co. vs. Kuper,
90 Md. 529
45 Atl. 197.

"Beyond that, the point of the objection is that the seller must have, at the time the agreement is made, such title and capacity to convey, or such means and right to acquire them, as will enable him to fulfil the contract on his part; otherwise the court will not hold the purchaser to a specific performance. But we do not so understand the rule. On the contrary, if the obligation of the contract be mutual, and the seller is able, in season to comply with its requirements on his part, to make good the title which he has undertaken to convey, we see no ground on which the purchaser ought to be permitted to excuse himself from its acceptance."

Dresel vs. Jordan
104 Mass. 407 o. p. 414.

"Even equity may enforce the specific performance of a contract, for a sale of land, although the vendor has no title at the time of the sale or even at the time of filing the bill, so as he can make a good title at the time of the decree. The purchaser ought not to complain if he gets that for which he contracted, and in as good a condition as he had a right to expect."

Mason vs. Caldwell
5 Gilman 196
48 Am. Dec. 330, o. p. 335.

"The complainant had a right to file his bill to compel the defendant to complete his contract, or to have it rescinded and to have the purchase-money restored. By his answer, the defendant consents

and offers to execute the contract; and although he was not then in a situation to give a good title, yet, from the subsequent release from Deponceau, and the deed from Brunson and wife, which were exhibited on the hearing, it is probable that he can now give a good title to the land selected and agreed upon between him and the agent of the complainant in 1824. The complainant is not bound, however, to take that title until it has been examined and passed upon by a master. If the defendant can give a good title, the complainant must now accept of it, together with an equitable compensation for the delay: . . . ”

Pierce vs. Nichols
1 Paige, 244.

“The court will not decree a specific performance where the vendor cannot make a clear and undoubted title to the premises, unless the purchase has been made at the risk of the vendee as to the title, or the latter has agreed to accept such title as the vendor was able to give. In general, however, it is not necessary for the complainant to show that he was able to give a good title at the time of making the agreement to sell, or even at the commencement of the suit. It will be sufficient if he can give a perfect title at the time of the decree, or at the time when the master makes his report. (*Lanøford v. Pitt*, 1 P. Wms. 630; *Clute v. Robinson*, 2 John. Rep. 595, *Coffin v. Cooper*, 14 Ves. 205.)”

Brown vs. Haff
5 Paige 234, o. p. 240.

“It is not a matter of course, however, to dismiss a bill for specific performance merely because the title was not perfect at the commencement of the suit; although that may be a sufficient reason for giving costs to the defendant, if he has not made any unreasonable objection to the title. A specific performance may be decreed, if it appears by the report of a master that a perfect title can be made to the purchaser at the time of making such report, un-

less the purchaser has been materially injured by the delay."

Dutch Church in Garden St. vs. Mott
7 Paige, 77, o. p. 85.

"The defendant concedes that there are precedents where a decree has been made on terms allowing a vendor to remove mortgages from the property (*Oakey v. Cook*, 41 N. J. Eq. 350, 7 Atl. 495), and where the vendor has perfected his title before bill filed, or before the hearing, or before the decree, or even after that time, when the vendor held a contract entitling him to such outstanding interest (*Soper v. Kipp*, 5 N. J. Eq. 383), but it is contended that no cases can be found where additional time has been decreed to afford an opportunity to acquire an outstanding title over which the vendor had no control. When the vendor in a suit for specific performance, by reason of the silence or the conduct of the vendee, regarding the title to be conveyed, during the negotiations or in the progress of the cause, has lost an opportunity to perfect his title before decree, this opportunity will still be afforded to him by the allowance of a reasonable time even after the entry of the decree, if it can be done without hardship to the vendee.

"It is apparent that, by reason of the defendant's delay in not bringing forth her objection until the very day of the hearing, an equity has arisen in favor of the complainant that he be not deprived of the period of time which he would have had under the ordinary rules, and therefore we are constrained to hold that the allowance of thirty days after the making of the decree within which to obtain a release for the alleged outstanding interest is not inequitable, and does not work hardship upon the defendant."

Van Riper vs. Wickersham (N. J.)
76 Atl. 1020

30 L. R. A. (N. S.) 25, o. p. 30.

A contract for the sale of land will be specifically enforced although the consent of a third person not

a party to the contract is required to perfect the title where it appears that such consent has been secured after the filing of the bill. (*Rice vs. Theimer* (Okla.) 146 Pac. 702).

It has very recently been held by the Circuit Court of Appeals for the Fifth Circuit that even where the obligations of the plaintiff under the contract sought to be enforced call for a continued operation and through a term of years of an electrical power plant involving the rendition of skilled personal services and the outlay of considerable sums of money, yet the court will grant specific performance of a contract against the other party where the decree can adequately insure performance on plaintiff's part also. (*Montgomery Traction Company vs. Montgomery L. & W. P. Co.* 229 Fed. 672).

The same principle has long been recognized in that class of cases where it is held that the existence of an incumbrance on land contracted to be sold does not defeat specific performance of the contract where by the decree the purchaser can be protected by deduction in the purchase price to pay off the incumbrance. (*Guild vs. Atchison, Topeka & Santa Fe Railway Co.* (Kans.) 45 Pac. 82).

The court therefore did not err in making its decree conditional upon the procuring of the consent of the Great Northern Railway Company, especially in view of the fact that the objection was raised for the first time at the hearing of the case, and that appellee had every reasonable ground to suppose that the burden

had at all times been upon the appellant to procure this consent.

By the earnestness of appellant's argument before the District Court, the court, in order to make sure that an injustice should not be done, required appellee to show the consent of the Great Northern Railway Company to this assignment. When the consent was proposed, appellant made technical objections to it upon the grounds that it did not show upon its face the authority of the officer to execute it, and that it was undated, and had not the seal of the corporation affixed. These objections were and are of the most trivial character, but the court required proof of the authenticity of this consent and consequently it became necessary for appellee to introduce testimony showing the execution of the consent and the authority of the officer to execute it. To do this, two depositions were taken and offered in evidence upon October 3rd. The appellant contends that their admission in evidence was erroneous for the reason that they were not taken in compliance with Rule 47 of the Equity Rules for the United States courts.

We respectfully call the attention of the court to the application for permission to take depositions (Trans. p. 213), the affidavit of W. H. Hoover in support thereof on page 210, and the order of the court permitting the taking of depositions on page 214, and the notice of taking depositions on page 209. Litigants would certainly be in a very embarrassing situation : the United States courts if depositions could never be used in evidence except those filed by the plaintiff

within sixty days from the time the cause is at issue, and those of the defendant within thirty days thereafter. The rule was never designed to be exclusive and it clearly states, although that portion seems to be omitted from the rule as quoted in appellant's brief: "All depositions taken under a statute or under any such order of the court shall be taken and filed as follows, *unless otherwise ordered by the court or judge for good cause shown*: those of the plaintiff within sixty days, etc." The record of the case is entirely adequate to show the good cause required by the rule for the taking of the depositions and filing them after the original hearing. No necessity had theretofore arisen for the introduction of the evidence sought by the depositions. This is all clearly shown by the affidavit of W. H. Hoover, and by the record.

We also call attention of the court to Rule No. 56, which was substantially complied with in every respect.

The objection was not well taken for a still further reason. The rules of court are in no way a limitation on Section 863, U. S. R. S., which provides that "the testimony of any witness may be taken in any civil case depending in a district or circuit court by deposition . . . when the witness lives at a greater distance from the place of trial than one hundred miles . . . ". The taking of the depositions in all respects complied with the statute and there is no objection made that they did not. The statute having been complied with even if the equity rule were not strictly followed, the depositions would be properly admissible. .

The most recent case upon the question that we have

been able to find is Iowa Washing Machine Company vs. Montgomery-Ward & Company, in the Southern District of New York, 227 Fed. 1004. On page 1007 the court says:

“Finally, I am asked to pass upon the question of practice in respect of which it is said the members of the Bar are somewhat in doubt. The defendant objected to the admission in evidence of certain depositions taken by plaintiff without first obtaining leave of the court. These depositions were taken under Section 863, R. S. U. S., and apparently within the time provided by Equity Rule 47, but without an order of court. I am of opinion that Equity Rule 47 was not intended to vary or be a limitation upon Section 863, because, of course, that section being Legislative enactment, cannot be changed except by further Legislative enactment.”

The depositions, both under the Equity Rules and under the statute, were properly admissible, and they were adequate to prove the execution of this consent by Robert I. Farrington while he was Second Vice-President of the Great Northern Railway Company. While he does not state at what date he signed this consent, he does state that it was while he was Second Vice-President of the Great Northern Railway Company, and the date is supplied by the testimony of Mr. Reynolds, which shows that it was signed on or about the 12th day of June, A. D. 1909, and at all events, prior to June 15th, the time of the execution of the contract (Trans. p. 196). By the deposition of L. E. Katzenbach, the present Secretary and Treasurer of the Great Northern Railway Company, it was proved that Mr. Robert I. Farrington was the duly elected and acting Second Vice-President of the Great Northern

Railway Company from December 30, 1901, to October 15, 1909, and that he was Vice-President thereafter and until December, 1912 (Trans. p. 188). This was proved by the original minute books of the corporation.

No objection was made at the time of the examination of Mr. Katzenbach, although Mr. MacLeish, the attorney for the appellant, was present throughout the examination and cross-examined the witness. However, when the deposition was introduced at the hearing, objection was made that the records were not shown to have been correctly kept and that they were not identified (Trans. p. 187). This objection was clearly waived by not taking it at the time of the examination of the witness. Appellant then had an opportunity to object, and if he had objected, any such technical objection could then have been cleared up by the testimony of the witness. The objection, however, is not well taken even if it be considered as properly interposed.

Mr. Katzenbach testified that all the minutes from which he read are contained in an official minute book of the Company and that it is a part of his duties as Secretary and Treasurer of the Company to have the custody and control of these books; that the minutes of all of the meetings referred to are attested by the Secretary or Assistant Secretary of the Company (Trans. p. 192).

“Corporate books and minutes may be identified by having an officer swear that he is the proper custodian and that they are the original books. (Cook on Corporations, Sections 714 and 753).”

Lowry National Bank vs. Fickett
22 Ga. 489.

In the case of *Tarbell & Whitham vs. Gifford* (Vt.) 72 Atl. 921, the constitution of a society was admitted in evidence upon proof that it was found and kept in the archives of the society and acted under as a constitution, and the minute book of the society was authenticated by proving that it was the book in which the society kept the record of its meetings.

In the case of *Gold Glen Mining, Milling & Tunneling Company vs. Daniels* (Colo.) 121 Pac. 677, it was held that the mere production in court by the corporation of a book purporting to be its minute book is sufficient identification of the minutes to warrant their introduction in evidence where they are not being offered to support the case of the corporation.

Section 3902, Revised Codes, 1907, of the State of Montana provides:

"All corporations for profit are required to keep a record of all their business transactions, a journal of all meetings of their Directors, members, or stockholders, with the time and place of holding the same, whether regular or special, and if special, its object, how authorized, and the notice thereof given. The record must embrace every act done or ordered to be done".

We assume that Minnesota has a similar law and are entitled to indulge the presumption that the duty enjoined by the statute was properly carried out.

Proof almost identical with that offered in the principal case was held sufficient in the case of *American Trust Company of San Francisco vs. Dickinson* (Cal.) 157 Pac. 615, o. p. 618.

The following cases give ample support to those cited:

State Loan Association vs. Moore (Del.) 55
Atl. 946

Schubert Lodge No. 18 K. of P. vs. Schubert
K. U. Verein (N. J.) 38 Atl. 347

Smith vs. Moore, 199 Fed. 697.

The by-laws were admitted without objection (Trans. p. 190) and show the authority of the Second Vice-President to execute this consent. Mr. Farrington himself testified that he was Second Vice-President throughout the entire period and throughout the month of June, 1909, and that he signed the consent in his capacity as Second Vice-President while acting for the Great Northern Railway Company. This evidence alone is sufficient.

Even after the introduction of this proof, appellants are still contending that the title which the decree compels them to take is not a merchantable title. They return as if in a spirit of despair to the insufficiency of the consent. But by their repeated insistence upon this insufficiency, they have finally placed themselves in a position where there is no escape from the conclusion that they have had this consent from the time dating before the original execution of this contract; and if they now seek to complain that this is not a sufficient consent, they have only themselves to blame because it was their consent, prepared by their attorney, forwarded at the request of their President, and signed and returned at his request. The copy which is now on file in court is but a duplicate copy, and according to the letters passing between Mr. Veazey and the Great Northern Railway Company, the other duplicate copy

has at all times been in the possession of the United States Gypsum Company itself.

This attitude is in keeping with the attitude of this appellant throughout the proceedings leading up to this litigation and at all times since. If there were any merit in this contention that the Great Northern Railway Company did not consent to the assignment of the lease, every opportunity was afforded to the appellant to attack the assignment and introduce evidence to that effect. A consent once given need not be re-affirmed. A new consent cannot properly be asked for. Since the Railway Company has once given its consent to the sub-leasing of the premises and the subsequent assignment of the lease, that consent stands and it cannot be made stronger or more effective by any further writing.

The evidence taken altogether makes it apparent that the District Court required more than was necessary of the appellee when it required the production of the consent of the Great Northern Railway Company, and the subsequent proof made apparent that our contention with reference to the interpretation of the contract, to-wit: that the burden was upon the Gypsum Company to obtain the consent, and in all else comply with the lease with the Great Northern Railway Company, was the interpretation which the parties had adopted and was the correct one. While this might furnish grounds for the appellee to complain, it certainly does not help appellant's case.

Counsel for appellant call the attention of the court to the fact that the decree provides interest from July

6th, the time when the contract should have been performed. As the proof subsequently showed, appellee was able and willing to give and did actually tender a good and sufficient conveyance and title to the appellant on July 6th, and taking the position that the appellant was wrong in refusing to carry out the contract at that time, equity cannot do justice in any other way than by placing appellee in the same position it would have been in had the contract been executed according to its terms: and this can be done only by allowing interest from the date when the appellant should have performed.

It is respectfully submitted that the District Court did not err in any of the particulars specified in appellant's brief, and that the decree ought to be affirmed.

COOPER, STEPHENSON & HOOVER,

Ransom Cooper,

W. H. Hoover,

Attorneys for Appellee.

IN THE
United States Circuit Court of Appeals.
FOR THE NINTH CIRCUIT.

No. 3111

UNITED STATES GYPSUM COMPANY,
A CORPORATION, *Appellant,*
vs.

THE MACKEY WALL PLASTER COMPANY,
A CORPORATION, *Appellee.*

PETITION OF UNITED STATES GYPSUM COMPANY FOR
REHEARING.

SCOTT, BANCROFT, MARTIN & STEPHENS,
NORRIS & HURD,
JOHN E. MACLEISH,
Attorneys for Petitioner.

JOHN E. MACLEISH,
Of Counsel.



IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

UNITED STATES GYPSUM COMPANY,
A CORPORATION.

Appellant,

v.

THE MACKEY WALL PLASTER COMPANY,
A CORPORATION,

Appellee.

PETITION FOR REHEARING.

NOW COMES United States Gypsum Company, a corporation, appellant, and respectfully petitions this Honorable Court for a rehearing of the above entitled cause, for the reason that:

I.

THIS COURT ERRED IN AFFIRMING THE DECREE OF THE DISTRICT COURT, BECAUSE:

A.

UPON THE RECORD IN THIS CASE THE CONTRACT INVOLVED LACKED MUTUALITY AND THEREFORE SHOULD NOT HAVE BEEN SPECIFICALLY ENFORCED AGAINST PETITIONER.

The provisions contained in the lease between the Mackey Company and the Great Northern Railway Com-

pany barred an assignment of the lease without the consent of the Railway Company thereto, which consent it might withhold or grant at its pleasure. Under such circumstances the contract can not and ought not be specifically enforced.

In *Ellis v. Treat*, 236 Fed., 120, this court said:

“Even if the contract were specific and certain, we are of the opinion that within well-settled principles which govern specific performance, equity should withhold the specific relief here sought, on the ground that the complaint calls *for the performance of acts which require the participation of others not parties to the contract or to the suit*, such as the execution of articles of incorporation, the election of a board of directors, the adoption of resolutions, and other details of corporate action.”

We can see little if any distinction and none in principle between the acts there mentioned and a consent by the Railway Company in this case. The contract here as well as there would seem to depend upon the performance of acts by a third person. And there being no right in the Gypsum Company to specific performance there is none in the Mackey Company.

B.

THE RECORD DOES NOT SHOW THAT THE RAILWAY COMPANY
 CONSENTED TO THE ASSIGNMENT. SPECIFIC PERFORMANCE
 OF THE CONTRACT SHOULD THEREFORE HAVE BEEN DENIED.

In any event, unless the Railway Company consented to
 the assignment, the contract could not be specifically en-
 forced.

In *Hurlbut v. Kantzler*, 112 Ill., 482,

an action was brought for the specific performance of a
 contract to assign a lease. In denying the relief sought,
 the court said, among other things (p. 488):

“The complainant has no equities against the
 board of education [the lessor], and no right, legal
 or equitable, to require them to consent to the assign-
 ment of either of the leases, in whole or in part. A
 party leasing has a right to prohibit any assign-
 ment of the lease without his assent, otherwise he
 might have his property occupied by a tenant he
 would not trust, or by one under no personal cove-
 nant to pay the rent. * * *

There is no allegation in the bills, or proof, that
 the consent of the board of education will be given,
 or ever was given.

* * * “If the court cannot compel the board
 to consent to an assignment to complainant, how can
 it secure the execution of a valid and binding trans-
 fer of the lease?”

In *Ellis v. Small*, 209 Mass., 147; 95 N. E., 79,

a bill was filed to compel an assignment of a lease which
 contained a covenant not to assign or underlet without

the written consent of the lessor. In denying the relief sought, the court said:

“An assignment by the defendant would be a violation of the covenant and would give the lessor an immediate right of re-entry. There is nothing to show that the lessor has waived his right of re-entry. It would be futile, therefore, to compel the defendant to assign the lease. Under such circumstances equity will not enforce specific performance.”

These were cases where the purchaser sought specific performance.

In *Roberts v. Geis*, 2 Daly (N. Y.), 535, 541, the vendor filed the bill. In denying the relief the court said:

“This action is brought to compel the defendants to accept the assignment, irrespective of the landlord’s consent, or for damages equivalent to the amount which the defendants agreed to pay for the assignment. No court of equity would compel the defendants to take a leasehold estate, pay the consideration therefor, when, by the very act of assignment, the landlord would have the right to re-enter and deprive them of the estate.”

See, also:

Woodward v. Aspinwall, 5 N. Y. Sup. Ct. (3 Sandf.), 272.

These authorities make it clear (and we are aware of none in conflict with them) that the consent of the Railway Company to the assignment was a prerequisite to any specific enforcement of the contract either at the in-

stance of the Mackey Company or of the Gypsum Company.

And the District Court so held. That court thereupon, requiring the Mackey Company to obtain the consent as a condition to having a decree, granted an additional period of time to obtain the consent. (Transe., 207.)*

Whether or not the court was warranted in this latter action, it has been affirmed in that respect by this court and we bow to that decision.

Our contention, however, now is, as it was before, that the record and proof herein do not show that the requisite consent was in fact obtained. This question was discussed to some extent by us in our original brief under Point IV thereof, and we will not repeat what was there said. What little we say in addition, will be said in connection with the point following. Suffice it to say that, in our opinion, it is doubtful if the evidence was sufficient to prove a consent in an action to which the Railway Company itself was a party. Much less, we think, was it sufficient in this action. Much of the evidence was clearly incompetent as against the Gypsum Company (as for instance the correspondence between Veazey & Veazey and Broughton (Transe., 194, 196), and Katzenbach's evidence as to the corporate books and records (Transe., 187-192), and Hoover's testimony as to his conversation with Veazey, Jr. (Transe., 198), while the rest

*References are to the printed transcript.

of it, in our view, came far from establishing a valid and effective consent.

The District Court however, held that the so-called "consent" (Plff's Exh. "A", Transe., 177) was a sufficient compliance with the condition and directed the entry of the decree (Transe., 216). Again this court affirmed on the ground that "Under the circumstances the proof was clear that consent was given by the railway company before the original contract was executed." And further, "Suffice it to say that they, [the depositions] satisfactorily establish the execution of the consent by one of the vice-presidents of the Railway Company in June, 1909, prior to the execution of the agreement between the parties to the present litigation."

The holding of the District Court in this respect is not clear. In its first opinion, it apparently contemplated a *present* consent. (Transe., 207. See also Mem. Op., Transe., 208.) And subsequently the so-called "consent" was held to be a compliance with the condition. (Transe., 216.) This court holds the consent not a *present* one, but one given long prior hereto.

But whatever may be our views of the sufficiency of the evidence to prove a consent, and whatever difference there may be between the District Court and this court as to the nature of the "consent," both the District and this court actually *decided* the question of consent.

This then brings us to our principal contention, which is

C.

THAT ALTHOUGH THE DISTRICT COURT, AS WELL AS THIS COURT, ASSUMED THE RIGHT TO DECIDE THE QUESTION OF THE VALIDITY AND EFFECT OF THE SO-CALLED "CONSENT" IN THIS PROCEEDING TO WHICH THE RAILWAY COMPANY IS NOT A PARTY, AND ALTHOUGH SUCH QUESTION WAS ACTUALLY DECIDED, THE DECISION IS IN NO WAY BINDING UPON THE RAILWAY COMPANY. AS A RESULT THE GYPSUM COMPANY IS COMPELLED, BY THE DECREES OF THE DISTRICT COURT AND OF THIS COURT, TO TAKE A DOUBTFUL AND QUESTIONABLE TITLE. BOTH THE DISTRICT AND THIS COURT, WITHOUT DECIDING THE QUESTION, OR ATTEMPTING TO DECIDE THE QUESTION, SHOULD HAVE DENIED THE RELIEF SOUGHT.

Authorities are hardly necessary for the proposition that equity will not compel a purchaser to take a doubtful title.

As is said in *Pomeroy on Specific Performance* (§ 203):

"One rule belonging to this branch of the subject is firmly established both in England and in the United States. A specific performance will never be decreed at the suit of the vendor whenever the doubt concerning his title is one which can only be settled by further litigation, or when the court can see that the purchaser will, with reasonable probability, be exposed to *bona fide* adverse claims on the part of third persons, and to the risk of litigation for the purpose of enforcing such claims. The reason of this rule is as obvious as the rule itself is just. The present decree binds only the parties to the suit and constitutes no bar nor even obstacle to proceedings by those who assert a right in conflict with the title which the vendor purports to hold and to transfer."

And in 36 Cyc., 632:

“To force upon the vendee a title which he may be compelled to defend in the courts, is to impose upon him a hard bargain, and this a court of equity in the exercise of its discretion, will refuse to do, *irrespective of the question whether the title is actually good or bad.*”

See *Wesley v. Eeles*, 177 U. S., 370, and cases cited therein.

See also,

Fleming v. Burnham, 100 N. Y., 1,
and other cases also cited in our original brief.

Certainly, no *present* consent was obtained. The decree rests entirely upon the writing purporting to be a consent executed, if at all, in 1909. No present officer or director of the Railway Company testified or was called to testify that the Railway Company consented to the assignment or that the Railway Company recognized this “consent” as effective and binding upon it, or that the Railway Company confirmed or ratified the “consent” in any respect whatsoever. Farrington was neither an officer nor director when he testified, nor had he been since 1912 (Transe., 185). Katzenbach’s testimony related only to the corporate records, etc. Broughton was not called as a witness, nor did he testify, *although the notice, affidavit and order for taking the depositions specified Broughton as a necessary witness* (Transe., 211, 213, 210). In lieu of his testimony a letter was introduced in evidence, alleged to have been sent by

his office, a letter not at all competent as against the Gypsum Company, whatever might be its effect as against the Railway Company.

Likewise, E. C. Lindley was named as a necessary witness. But Lindley was not called in person to testify; and, as in Broughton's case, a letter supposed to have come from Lindley's office was presented, apparently to take the place of Lindley himself.

The "consent" itself is undated and is without the corporate seal, and therefore was incomplete and insufficient on its face, and was so held to be by the District Court (Transe., 208). Effect could be given it only through extrinsic evidence, through the testimony of witnesses and other extraneous proof. Questions of fact as to execution, authority to execute, and delivery, etc., arose respecting it which would have to be answered. Hoover, himself, testified to a conversation with Veazey, Jr., according to which the "consent" had never been delivered (Transe., 198).

Where the title rests upon doubtful questions of fact, and the rights of third persons are involved who are not parties to the proceeding, specific performance will be denied. Such a title is not marketable.

In *Lippincott v. Wikoff* (N. J.), 33 Atl., 305, the court reviews a large number of authorities, and says:

"In cases where the doubt in relation to title is one of fact which the court is called on to consider, the general rule has been declared to be that the

court will never compel a purchaser to take a title where the point on which it depends is too doubtful to be settled without litigation, or where the purchase would expose him to the hazard of such proceedings.”

In *Irving v. Campbell* (N. Y.), 24 N. E., 821, plaintiff vendor sued for specific performance. One link in the chain of title was a deed from Thomas Lawrence, through which deed plaintiff claimed. Owing to a defect in the acknowledgment of the deed it was necessary to prove the deed and delivery by parol. The court denied specific performance, saying:

“That the deed from Lawrence to Eliza Irving was actually made and delivered to the grantee by Lawrence was satisfactorily proved upon the trial of this case; but such proof rested altogether in parol, and might or might not be available to the holders of title under the plaintiff in any subsequent litigation between them and adverse claimants under Lawrence. * * *

Whatever conclusion might be reached by us in this case as to the validity of the plaintiff’s title, must, therefore, be unavailing to her grantee in any future contest with claimants under Lawrence either by inheritance or purchase. In the absence of a good record title he must necessarily be driven to rely for a defense upon parol evidence, which might then be assessible or not, according to circumstances beyond his control.”

And it will be noted that in the case just cited, the fact of execution and delivery the court deemed to be proved. Still specific performance was denied.

See also *Moore v. Williams* (N. Y.), 22 N. E., 233, wherein it is said:

“A purchaser will not generally be compelled to take a title when there is a defect in the record title which can be cured only by a resort to parol evidence.”

And *Fleming v. Burnham* (N. Y.), 2 N. E., 905-7, where it is said:

“It would be especially unjust to compel a purchaser to take a title, the validity of which depended upon a question of fact, where the facts presented on the application might be changed on a new inquiry, or are open to opposing inferences.”

The District Court and this court in this case have adjudicated the rights of the Railway Company in this leasehold property in an action in which the Railway Company could not even be heard. Does this court hold that these decrees could in any way affect its interest? That these decrees in this action in which the Railway Company had no right to be admitted “make a defense, or examine witnesses, or appeal from a judgment he might think erroneous” are binding upon it?

The question as to the present effect of the “consent” was a most serious one.

As we have heretofore said, whether this “consent” was effective in 1917 against the Railway Company, would depend upon facts and circumstances to be established by proof. But not only have the District Court and this court decided all these questions, although con-

fessedly the Railway Company is not bound thereby, but the Gypsum Company is required to take the title upon the strength of such decisions, although they are practically without effect. Whatever conclusion the District Court or this court might reach on this point in this action, would have no effect in a proceeding by the Railway Company to forfeit the lease, or in any other action which might be brought to try out the question. *The decrees in this case are wrong not so much because they decided the question of consent and decided it erroneously, but because they decided the question at all.*

In his work on Specific Performance, Mr. Pomeroy says:

“It is the rule that in suits by a vendor, the purchaser will not be forced to complete the contract unless the title is free from any reasonable doubt.
* * *. If, however, there arises, either in the face of the pleadings, or from the examination made during the progress of the suit, a reasonable doubt concerning the title to be made and given by the vendor, the court, *without deciding the question between the parties then before it*—which decision might not be binding upon third persons, and, therefore, might not prevent the same question from being subsequently raised by other claimants of the land—regards the *existence* of this doubt as a sufficient reason for not compelling the purchaser to carry out the agreement and accept a conveyance.”

What is the result? The Gypsum Company is compelled to pay more than \$50,000 for a property, and it does not know when it receives the property whether

its title thereto is good or not. If the Railway Company, in fact, consented, i. e., if this document, the so-called "consent," is now binding upon the Railway Company, the Gypsum Company's title will be good. If on the other hand the Railway Company has not in fact consented, i. e., if the so-called "consent" is denied force and effect as against the Railway Company, the sale and assignment to the Gypsum Company is a breach of the covenant in the lease and the title of the Gypsum Company to a most important portion of the properties is subject to immediate destruction. Notwithstanding the decrees herein, the question of consent is still open to the Railway Company.

Immediately after the deed passed to the Gypsum Company the Railway Company could declare a forfeiture of the lease and could institute proceedings to oust the Gypsum Company from possession. Why should the Gypsum Company be required to pay its money for the privilege of further litigation?

Your petitioner therefore prays that an order may be made for a re-hearing of the argument in this cause, on a day to be appointed by the court, at such time and upon such points as the court may direct.

SCOTT, BANCROFT, MARTIN & STEPHENS,
NORRIS & HURD,
JOHN E. MACLEISH,

Attorneys for Appellant,

United States Gypsum Company.

JOHN E. MACLEISH,
of Counsel.

IN THE

United States Circuit Court of Appeals.

FOR THE NINTH CIRCUIT.

UNITED STATES GYPSUM COMPANY,

A CORPORATION,

Appellant,

VS.

THE MACKEY WALL PLASTER COMPANY,

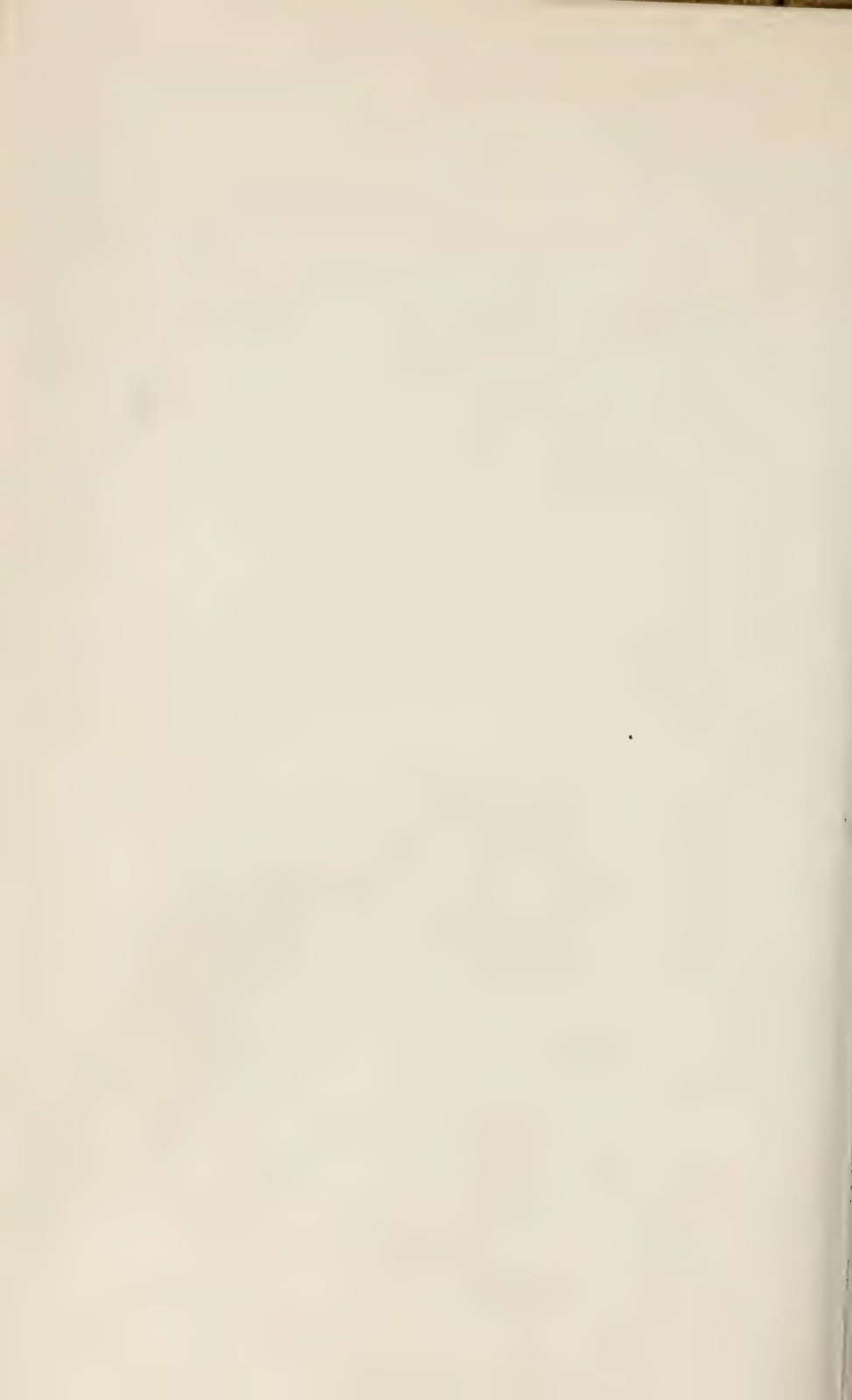
A CORPORATION,

Appellee.

CERTIFICATE.

I, JOHN E. MACLEISH, HEREBY CERTIFY that I am counsel for United States Gypsum Company, Appellant in this cause, and petitioner herein, and that the foregoing petition for re-hearing is, in my judgment, well founded, and that it is not interposed for delay.

JOHN E. MACLEISH.



United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF SEATTLE, a Municipal Corporation,
Plaintiff in Error,
vs.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

FILED
FEB 2 - 1918
F. J. MURKIN,
CLERK.

United States
Circuit Court of Appeals
For the Ninth Circuit.

CITY OF SEATTLE, a Municipal Corporation,
Plaintiff in Error,
vs.
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Transcript of Record.

Upon Writ of Error to the United States District Court for the
Western District of Washington, Northern Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Names and Addresses of Counsel.

HUGH M. CALDWELL, Esq., Corporation Coun-
sel, Attorney for Plaintiff in Error, 527 King
County Court House, Seattle, Washington.

FRANK S. GRIFFITH, Esq., Assistant Corpora-
tion Counsel, Attorney for Plaintiff in Error,
King County Court House, Seattle, Washington.

Messrs. BOGLE, GRAVES, MERRITT & BOGLE,
Attorneys for Defendant in Error, 609 Central
Building, Seattle, Washington.

Messrs. FLICK & PAUL, Attorneys for Defendant
in Error, 915 Hoge Building, Seattle Washing-
ton.

Messrs. HUGHES, McMICKEN, RAMSEY &
RUPP, Attorneys for Defendant in Error 915
Hoge Building, Seattle, Washington. [1*]

*Page-number appearing at foot of page of original certified Transcript
of Record.

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant.

Amended Complaint.

Comes now Lloyds Plate Glass Insurance Company, by its attorneys, Flick & Paul, Bogle, Graves, Merritt & Bogle, and Hughes, McMicken, Dovell & Ramsey, and for cause of action against the defendant, the City of Seattle, complains and alleges as follows:

I.

That the plaintiff is now, was at all times hereinafter mentioned, and for more than one year last past has been, a corporation organized and existing under the laws of the State of New York, with its residence and principal place of business at 63 William Street in the City of New York in said state, and is a citizen and resident of said state, and qualified, licensed and authorized to do business as an insurance company in the State of Washington, having complied with all the requirements thereof relating to foreign insurance companies carrying on business in said state and having designated, ap-

pointed and maintained, during all of said time an agent, resident in the City of Seattle, county of King, in said state, and having paid its annual license fee last due. [2]

II.

That the Globe Indemnity Company is now, was at all times hereinafter mentioned, and for more than one year last past has been, a corporation organized and existing under the laws of the State of New York, with its residence and principal place of business at 45 William Street in the city of New York in said state, and is a citizen and resident of said state, and qualified, licensed and authorized to do business as an insurance company in the State of Washington, having complied with all the requirements thereof relating to foreign insurance companies carrying on business in said state and having designated, appointed and maintained, during all of said time an agent, resident in the City of Seattle, county of King, in said state, and having paid its annual license fee last due.

III.

That the defendant, the City of Seattle, is now and at all times mentioned herein was a municipal corporation of the first class, organized, created and existing under and by virtue of the laws of the State of Washington, located in the county of King, in the Northern Division of the Western District of Washington.

IV.

That prior to May 30, 1915, and up to and including said date, each of the persons, firms and corpo-

rations named in the schedule hereto attached, marked Exhibit "A" and hereby made a part of this complaint, being then the owners respectively of the glass windows, doors or transoms located in the city of Seattle, at the places in said exhibit designated by street numbers after the names of such persons, [3] obtained from the plaintiff, in consideration of the payment of its established premiums, plaintiff's policies of insurance a specimen copy of which is attached hereto, marked Exhibit "D" and made a part hereof, insuring said owners against loss by breakage of said glass in a sum aggregating the amount set forth after each of said names, and said policies and each of them were in full force and effect upon and including May 30th, 1915.

V.

That prior to May 30, 1915, and up to and including said date, each of the persons, firms and corporations named in the schedule hereto attached, marked Exhibit "B" and hereby made a part of this complaint, being then the owners respectively of the glass windows, doors or transoms located in the city of Seattle, at the places in said exhibit designated by street numbers after the names of such persons, obtained from the Globe Indemnity Company, in consideration of the payment of its established premiums, the Globe Indemnity Company's policies of insurance, a specimen copy of which is attached hereto, marked Exhibit "E" and made a part hereof, insuring said owners against loss by breakage of said glass in a sum aggregating the amount set forth after each of said names, and said policies and each thereof

were in full force and effect upon and including May 30, 1915.

VI.

That upon the 6th day of November, 1911, the Council of the City of Seattle passed an Ordinance, No. 28,324, the title of said ordinance being as follows:

VI.

“AN ORDINANCE for limiting fire hazard in the City of Seattle, having reference to buildings, [4] their inspection, alteration, hazardous use, safety appliances and protection from fire and explosion; and as incident thereto, creating a Fire Patrol System in the Fire Department, prescribing the powers and duties of certain officers and other persons in relation thereto and with reference to fire protective measures; regulating the handling, transportation, storage, sale and use of explosives, fire works, dangerous chemicals, petroleum, kerosene, turpentine, and other inflammable liquids, oils and materials; regulating the burning and disposition of rubbish and refuse; prohibiting tampering with the Fire Alarm System and City poles; prohibiting the impersonation of firemen; regulating traffic during fires; allowing appeals licenses and permits and providing penalties for the violation of this Ordinance.”

That said ordinance was approved by the mayor of said city November 7, 1911, to take effect thirty days after approval, and since that date has been and

at all times herein mentioned was, a valid and subsisting ordinance of said city. That said ordinance is hereby referred to and made a part hereof with the same force and effect as if particularly set forth.

VII.

That upon the first day of March, 1915, the Council of the city of Seattle passed Ordinance No. 34,379, entitled:

“AN ORDINANCE establishing rules and regulations for the government and control of the navigable waters under the jurisdiction and control of the City of Seattle, establishing and prescribing the powers and duties of the port warden and other officials and employees of the City relating thereto, providing penalties for violation of the provisions hereof, and repealing Ordinance No. 31,368, entitled ‘An Ordinance relating to and providing rules and regulations for the government, control and use of the harbor, wharves and slips of and in the City of Seattle, providing penalties for violations thereof and repealing all ordinances or parts thereof in conflict herewith,’ approved May 27, 1913, and all other ordinances in so far as they may be in conflict.”

That said ordinance was approved by the mayor of said city, March 3, 1915, filed with the city clerk, March 3, 1915, published March 12, 1915, and since that date has been, and at all times mentioned herein, was a valid and subsisting [5] ordinance of said city.

That said ordinance is hereby referred to and made

a part hereof with the same force and effect as if particularly set forth.

VIII.

That buoy Number 1 is a buoy owned and maintained by the city of Seattle and under the supervision and control of the said city of Seattle and of the port warden of the said city, being located within that part of Seattle harbor known and designated as Elliott Bay Anchorage, within the city limits of said city.

That said buoy Number 1 is now and was at all times herein mentioned, located at a point near which ships and vessels were anchored and constantly passed in the ordinary course of travel and within 200 feet of the northern end of Harbor Island, upon the shore of which, prior to the first day of June, 1915, houses and dwellings were located; that said buoy is within a half mile of a part of the City of Seattle, where large numbers of people work and congregate, and where many mills, piers and docks are located, and within a mile of the downtown business and residential section of said city.

IX.

That on or about the 14th day of May, 1915, the port warden of the City of Seattle, together with other duly authorized and acting agents of the Harbor Department of said city, acting for and on behalf of said city, and at the instance of the Lillico Launch & Tow Boat Company, charterers of a certain scow, and agents of the owners of its cargo, directed that said scow containing 1415 cases of 90% nitro-glycerin content gelatin and 207 cases of 80% nitro-glycerin

content gelatin, [6] aggregating about 15 or 16 tons in weight, be tied up and moored to the said buoy No. 1; that the said port warden and said officers and agents knew that said scow contained high explosives, but nevertheless issued a permit therefor, and also did not require a bond or compel the said scow to be placarded and watched as provided by Ordinances Nos. 28,324 and 34,379, hereinbefore referred to; that thereafter and upon the 28th day of May, 1915, the said port warden and said officers and agents directed that a barge containing coal be removed from city buoy No. 2, and that the said barge be tied up and moored to buoy No. 1, though the said scow of nitro-glycerin was already attached to the said buoy, and that the said coal barge remained at said buoy up to, and including, the 30th day of May, 1915.

X.

That the said scow of nitro-glycerin was permitted to be moored to buoy No. 1 in Seattle Harbor by the port warden of the City of Seattle and other agents of the Harbor Department of said city, acting for and on behalf of said city, in consideration of revenue to be derived by the said city in the way of fees in accordance with a schedule for the mooring of vessels at city buoys, and that said fees were demanded by and paid to the said officers by the Lillico Launch & Tow Boat Company, the charterers of the said scow, and the said permission granted therefor.

XI.

That the said scow, by and under the direction of the port warden of the City of Seattle, and through duly authorized and acting agents of the Harbor De-

partment of said city acting on behalf of said city, was kept, stored and maintained, and so [7] remained in storage at the said buoy from the 14th day of May, 1915, until 2:00 A. M. upon the 30th day of May, 1915, when the nitro-glycerin therein contained, by reason of some cause or causes unknown to the plaintiff, and without any fault on its part, or on the part of the said Globe Indemnity Company, or on the part of any of the holders of the policies of insurance as set out in Exhibits "A" and "B" hereto attached, exploded with such violence as to break the glass and other structures covered by the said policies described in Exhibits "A" and "B," and the same were thereby broken and lost, and the plaintiff and the said Globe Indemnity Company were thereby rendered liable upon their several policies of insurance in the amounts and to the persons set forth in said exhibits.

XII.

That by reason of the acts and omissions of the port warden of the City of Seattle and other duly authorized and acting agents of the Harbor Department of said city, acting for and on behalf of said city, in keeping and maintaining the said scow of nitro-glycerin in and under the circumstances and conditions and in the manner hereinbefore set out and in violation of Ordinances Nos. 28,324 and 34,379 above referred to, a public and private nuisance was created and maintained, and that said nuisance so created and maintained was the proximate cause of the injury sustained by the policy-holders of the plaintiff herein, and of the said Globe Indemnity

Company, to whose rights the plaintiff and said Globe Indemnity Company, are subrogated as hereinafter set out. [8]

XIII.

That the acts and omissions of the port warden of the City of Seattle and other duly authorized and acting agents of the Harbor Department of said city, acting for and on behalf of said city, in keeping and maintaining the said scow of nitro-glycerin in and under the circumstances and conditions and in the manner hereinbefore set out and in violation of Ordinances Nos. 28,324 and 34,379 above referred to, rendering the said scow dangerous to the life, property and safety of the residents of said city, and particularly the policy-holders schedules in Exhibits "A" and "B," were negligent and careless and that said negligence and carelessness was the proximate cause of the injury sustained by the policy-holders of the plaintiff herein, and the said Globe Indemnity Company, to whose rights the plaintiff and said Globe Indemnity Company are subrogated as hereinafter set out.

XIV.

That said loss and damage was not brought about by reason of any peril or cause excepted by said policies of insurance and does not exceed the amount of the policies upon which the plaintiff and said Globe Indemnity Company are severally liable, and, as required and provided by its said policies, the plaintiff and the said Globe Indemnity Company have discharged their said liability by the payment of the value of the glass so broken and lost, or re-

moving and replacing same, less salvage; and each of the said policy-holders has heretofore by written instrument duly executed and delivered, sold, assigned and set over, all his right, title and interest in and to the claim or cause of action against said City of Seattle, in any wise arising or growing out of said explosion and the loss and damage thereby sustained, and thereby and by the provisions of said policies, [9] the plaintiff and said Globe Indemnity Company have been subrogated to the rights and claims of their said policy-holders, and each of them, in the premises.

XV.

That by reason of the acts and omissions of the port warden of the City of Seattle and other officers and agents of said city, as aforesaid, the plaintiff Lloyds Plate Glass Insurance Company, has been damaged in a total of the sums which it has paid in accordance with the terms of its said policies as set forth in Exhibit "A," to wit, in the sum of \$5,749.43.

XVI.

That by reason of the acts and omissions of the port warden of the City of Seattle and other officers and agents of said city, as aforesaid, said Globe Indemnity Company has been damaged in a total of the sums which it has paid in accordance with the terms of its said policies as set forth in Exhibit "B," to wit, in the sum of \$2,406.88.

XVII.

That upon the 19th day of February, 1917, the said Globe Indemnity Company, under a contract, copy of which is hereto attached and marked Exhibit

“C,” and made a part hereof, set over, transferred and assigned to the plaintiff herein all its right and interest in, to and under those certain policies set out in Exhibit “B,” hereof, and all claims for damages against the defendant accruing to the said Globe Indemnity Company under said policies by right of subrogation or otherwise.

XVIII.

That the plaintiff and the said Globe Indemnity Company upon the 29th day of June, 1915, filed with the clerk of the [10] City Council of the City of Seattle, duly verified claims for the injuries herein set out, copies of which are attached hereto marked Exhibits “F” and “G” and made a part hereof, and that said claims were passed upon and rejected by the city council of said city upon the 26th day of July, 1915, and the said city and its agents have wholly failed, neglected and refused to reimburse the plaintiff or the Globe Indemnity Company, or their policy-holders, for any part of the damage herein set out.

XIX.

That the amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interests and costs, and that the premises are within the jurisdiction of this Honorable Court.

WHEREFORE, the plaintiff prays judgment against the defendant, the City of Seattle, in the amount of Eight Thousand One Hundred Fifty-six

and 31/100 Dollars (\$8,156.31), and for its costs and disbursements herein.

FLICK & PAUL,

Attorneys for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Plaintiff.

HUGHES, McMICKEN, DOVELL & RAM-
SEY,

Attorneys for Plaintiff.

State of Washington,
County of King,—ss.

Lee D. Gilmer, being duly sworn on his oath, deposes and says:

That the above-named plaintiff, Lloyds Plate Glass Insurance Company, is a corporation organized under the laws of the State of New York, and has no officer within the State of Washington; that Shay Bros. and Gilmer is a corporation organized and existing under the laws of the State of Washington, and affiant is an officer thereof, to wit, its treasurer and secretary. That the said Shay Bros. and Gilmer, a corporation [11] is the duly appointed, qualified and acting agent of the said Lloyds Plate Glass Insurance Company in the State of Washington, and is authorized to verify the foregoing amended complaint upon behalf of said plaintiff. Affiant has read the said foregoing amended complaint, including the exhibits therein referred to and thereto attached, knows the contents thereof and the same is true as he verily believes. That all the material facts therein set forth are within the personal knowledge of affiant and he makes this affidavit as

the act of Shay Bros. and Gilmer upon behalf of said plaintiff and for the reasons above set out.

LEE D. GILMER.

Subscribed and sworn to before me this 25th day of May, 1917.

[Seal]

CHARLES H. PAUL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within received May 25, 1917.

HUGH M. CALDWELL,
Corporation Counsel.

[Endorsed]: Amended Complaint. (Exhibits omitted, see Stipulation *in re* Clerk's Copy and Printing.) Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. May 29, 1917. Frank L. Crosby, Clerk. [12]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant.

Demurrer to Amended Complaint.

Comes now the defendant and demurs to the

amended complaint of the plaintiff, and for cause of demurrer alleges:

I.

That the Court has neither jurisdiction of the person or of the subject matter of this action.

II.

That there is a defect of parties plaintiff.

III.

That several causes of action have been improperly united.

IV.

That the amended complaint does not state facts sufficient to constitute a cause of action, or to entitle the plaintiff to any relief whatsoever.

HUGH M. CALDWELL,
Corporation Counsel.

FRANK S. GRIFFITH,
Assistant,
Attorneys for Defendant.

Service of the within Demurrer by delivery of a copy to the undersigned is hereby acknowledged this — day of June, 1917.

FLICK & PAUL,
Attorneys for Plaintiff.

[Endorsed]: Demurrer to Amended Complaint.
Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 9, 1917.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[13]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation,
Defendant.

Order Overruling Demurrer to Complaint.

This cause having come on to be heard upon defendant's demurrer to the complaint and having been argued by counsel; and the Court having heretofore filed its memorandum decision sustaining said demurrer, whereupon a petition for rehearing was presented on behalf of the plaintiff, and said petition having been granted; upon consideration thereof and of the briefs filed and authorities cited by the respective parties, it is ordered and adjudged that said demurrer be and it is hereby overruled.

Defendant excepts and an exception is allowed.

Done in open Court this 10th day of September, 1917.

JEREMIAH NETERER,

Judge.

[Endorsed]: Order Overruling Demurrer to Complaint. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Sep. 10,

1917. Frank L. Crosby, Clerk. By Ed M. Lakin,
Deputy. [14]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant.

Answer to Amended Complaint.

Comes now the defendant, the City of Seattle, and
for answer to the amended complaint of plaintiff
herein, admits, denies and alleges as follows:

I.

That it has no knowledge or information sufficient
to form a belief as to any of the allegations contained
in paragraphs I and II of the amended complaint,
and therefore denies each and all of the allegations
contained in each of said paragraphs.

II.

It denies the allegations of paragraph III.

III.

It denies each and every of the allegations con-
tained in paragraph IV.

IV.

It denies each and every allegation contained in paragraph V.

V.

It admits the allegations contained in paragraph VI.

VI.

It admits the allegations of paragraph VII. [15]

VII.

Denies each and every allegation contained in paragraph VIII.

VIII.

Denies each and every allegation contained in paragraph IX.

IX.

Denies each and every allegation contained in paragraph X.

X.

Denies each and every allegation contained in paragraph XI, including the exhibits attached and made a part of said paragraph.

XI.

Denies each and every allegation contained in paragraph XII.

XII.

Denies each and every allegation contained in paragraph XIII, including the exhibits made a part of said paragraph.

XIII.

Denies each and every allegation contained in paragraph XIV.

XIV.

Denies each and every part of each and every allegation contained in paragraph XV, including each and every part of the exhibit therein mentioned.

XV.

Denies each and every part of each and every allegation contained in paragraph XVI, including each and every part of the exhibit therein mentioned.
[16]

XVI.

It denies each and every part of each and every allegation contained in paragraph XVII, including each and every part of the exhibits therein mentioned.

XVII.

It denies each and every allegation contained in paragraph XVIII, including the exhibits therein mentioned.

XVIII.

It denies each and every part of each and every allegation contained in paragraph XIX.

FIRST AFFIRMATIVE DEFENSE.

And for a first, further and affirmative defense, this defendant alleges:

1. That the City of Seattle is a municipal corporation of the first class, in the State of Washington, being in the Northern Division of the Western District.

2. That in 1896, the City of Seattle, under authority of the legislature of the State of Washington, adopted what is known as the Freeholders Charter;

that by Article XII there was created the "Harbor Department," by the terms of which it provided that the city council shall, unless otherwise prescribed by the laws of the State, exercise control and management of the harbor and waterfront of the City of Seattle, and shall, by ordinance, establish such rules and regulations as shall prevent any encroachment upon the tidal area of the same; and regulate tolls for wharfage, dockage, and other charges at all wharves, slips, docks and landing places within the city, and provide for the regulation of berths and landing of all steamers, sail vessels, barges or other water craft, and shall exercise in regard to all such wharves, slips, docks and landing places such other control as shall not be inconsistent with [17] the laws of the United States and of the State of Washington, and provides for a port warden who shall perform such duties not inconsistent with this charter as may be prescribed by ordinance.

3. That the State of Washington has at no time enacted any legislation requiring the City of Seattle to do or perform any act or acts in reference to buoys or to the landing of vessels or the care of the navigable waters in front of the City of Seattle.

4. That under the charter provision above referred to, the City of Seattle has no authority to construct, maintain or operate any buoy or buoys within the navigable waters in front of the City of Seattle.

5. That the City of Seattle has no authority to regulate or control the commerce of the United States or of the State of Washington, or of foreign countries coming into the harbor of Seattle.

SECOND AFFIRMATIVE DEFENSE.

For a further, second and affirmative defense, this defendant alleges:

1. That the City of Seattle is a municipal corporation of the first class, in the State of Washington.

2. That the charter provides for the appointment of a port warden whose duties are defined and prescribed by the provisions set forth in the first affirmative defense.

3. That the City of Seattle, in establishing a buoy in the navigable waters of Elliott Bay, and the harbor-master, in the management and control of said buoy, including the permitting of vessels to moor thereat, was without any authority and without the power of the City of Seattle or the port warden, and the acts and doings of the City of Seattle and its port warden were *ultra vires*. [18]

THIRD AFFIRMATIVE DEFENSE.

For a third, further and affirmative defense, defendant alleges:

1. That if the plaintiff suffered any injury or damage by reason of the acts complained of in its complaint, as far as the City of Seattle is concerned they are *damnum absque injuria*.

WHEREFORE, plaintiff, having fully answered, prays that it may go hence without day and recover its costs.

HUGH M. CALDWELL,
Corporation Counsel.
FRANK GRIFFITH,
Assistant,
Attorneys for Defendant.

State of Washington,
County of King,—ss.

H. C. Gill, being first duly sworn, on oath, says:
That he is mayor of the City of Seattle, the defendant named in the foregoing answer; that he has heard the same read, knows the contents thereof, and believes the same to be true.

H. C. GILL.

Subscribed and sworn to before me this 25th day
of September, 1917.

W. D. COVINGTON,
Notary Public in and for the State of Washington,
Residing at Seattle, Washington.

Service admitted this 25th day of Sept., 1917.

BOGLE, GRAVES, MERRITT & BOGLE,
HUGHES, McMICKEN, RAMSEY & RUPP,
FLICK & PAUL,
Attorneys for Plaintiff.

[Endorsed]: Answer to Amended Complaint.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division. Sep. 25, 1917.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[19]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, Municipal Corporation,
Defendant.

Demurrer to Affirmative Defenses.

I.

Comes now the plaintiff above named and demurs to the first affirmative defense set forth in defendant's answer to the amended complaint herein, upon the ground and for the reason that said affirmative defense does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's amended complaint.

II.

Demurs to the second affirmative defense set forth in defendant's said answer, upon the ground and for the reason that said affirmative defense does not state facts sufficient to constitute a defense to the cause of action set forth in plaintiff's amended complaint.

III.

Demurs to the third affirmative defense set forth in defendant's said answer, upon the ground and for the reason that said affirmative defense does not state

facts sufficient [20] to constitute a defense to the cause of action set forth in plaintiff's amended complaint.

FLICK & PAUL,
BOGLE, GRAVES, MERRITT & BOGLE,
HUGHES, McMICKEN, RAMSEY &
RUPP,

Attorneys for Plaintiff.

Copy of within Demurrers received and due service of same acknowledged this 25th day of October, 1917.

HUGH M. CALDWELL,
Corporation Counsel,
Attorney for Defendant.

[Endorsed]: Demurrer to Affirmative Defenses. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 3, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [21]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant.

Reply.

Comes now Lloyds Plate Glass Insurance Company, a corporation, plaintiff herein, by its attorneys, and waives its demurrer to the answer of the defendant, heretofore filed herein, for the purpose of this reply, but reserving the right to question the sufficiency of the defendant's answer at the time of the trial, and replies to the answer of the defendant herein, admitting, denying and alleging, as follows:

I.

For answer to paragraphs I, II and III of defendant's first affirmative defense, plaintiff admits the same.

II.

For answer to paragraph IV of defendant's first affirmative defense, plaintiff denies each and every allegation therein contained.

III.

For answer to paragraph V of defendant's first affirmative defense, plaintiff denies each and every allegation therein contained. [22]

IV.

For answer to paragraphs I and II of defendant's second affirmative defense, plaintiff admits the same.

V.

For answer to paragraph III of defendant's second affirmative defense, plaintiff denies each and every allegation therein contained.

VI.

For answer to paragraph I of defendant's third

affirmative defense, plaintiff denies each and every allegation therein contained.

WHEREFORE, plaintiff prays for judgment according to its complaint.

FLICK & PAUL,

Attorneys for Plaintiff.

BOGLE, GRAVES, MERRITT & BOGLE,

Attorneys for Plaintiff.

HUGHES, McMICKEN, RAMSEY & RUPP,

Attorneys for Plaintiff. [23]

State of Washington,

County of King,—ss.

Lee D. Gilmer, being duly sworn, on his oath deposes and says:

That the above-named plaintiff, Lloyds Plate Glass Insurance Company, is a corporation organized under the laws of the State of New York and has no officer within the State of Washington; that Shay Bros. and Gilmer is a corporation organized and existing under the laws of the State of Washington and affiant is an officer thereof, to wit, its treasurer and secretary. That the said Shay Bros. and Gilmer, a corporation, is the duly appointed, qualified and acting agent of the said Lloyds Plate Glass Insurance Company in the State of Washington and is authorized to verify the foregoing reply upon behalf of said plaintiff. Affiant has read the said foregoing reply, knows the contents thereof, and believes the same to be true, and he makes this affidavit as the act of Shay Bros. and Gilmer upon be-

half of said plaintiff and for the reasons above set out.

LEE D. GILMER.

Subscribed and sworn to before me this 23d day of November, 1917.

[Seal] MAURICE R. McMICKEN,
Notary Public in and for the State of Washington,
Residing at Seattle.

Copy of within received Nov. 22, 1917.

HUGH M. CALDWELL,
Corporation Counsel.

[Endorsed]: Reply. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Nov. 30, 1917. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [24]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

General Finding.

The Court in the above-entitled cause finds for the plaintiff in the sum of Eight Thousand One Hundred Fifty-six and 31/100 Dollars (\$8,156.31).

Defendant excepts to all the foregoing finding and its exception is allowed.

Done in open court this 10th day of January, 1918.

EDWARD E. CUSHMAN,

Judge.

Copy of within General Finding of Fact received, and due service of same acknowledged this 10th day of January, 1918.

HUGHES, McMICKEN, RAMSEY,
RUPP,

Of Attorneys for Plaintiff.

[Endorsed]: General Finding. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [25]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Judgment.

This cause having come on regularly for trial before the Court upon the issues of fact raised by the pleadings, the stipulation in writing by the parties having been therefore filed in said cause waiving a jury, plaintiff appearing by E. C. Luccock of Bogle, Graves, Merritt & Bogle, and E. H. Flick of Flick & Paul, and Otto B. Rupp of Hughes, McMicken, Ramsey & Rupp, its attorneys, and the defendant appearing by Hugh M. Caldwell and Frank S. Griffith, its attorneys; trial thereof having proceeded with the introduction of evidence on behalf of the respective parties, the parties having rested and the Court having heard the argument of counsel; thereupon the Court duly considering the evidence and the law applicable thereto and being fully advised in the premises, and the Court having found the issue for the plaintiff in the sum of \$8,156.31:

Now, therefore, upon motion of the plaintiff, the Court being fully advised in the premises, it is **CONSIDERED, ORDERED AND ADJUDGED** that Lloyds Plate Glass Insurance Company, a corporation, above-named plaintiff, do have and recover of and from the City of Seattle, a municipal corporation, the [26] above-named defendant, the sum of Eight Thousand One Hundred Fifty-six and 31/100 Dollars (\$8,156.31), and its costs and disbursements herein taxed, the sum of Seventy and 10/100 Dollars.

Done in open court this 10th day of January, 1918,

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Judgment. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [27]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Motion for New Trial.

Comes now the City of Seattle, defendant, and moves the Court to vacate and set aside the judgment directed herein, and grant a new trial, for the following causes materially affecting the substantial rights of the City of Seattle:

I.

Insufficiency of the evidence to justify the decision.

II.

Error in law occurring at the trial.

HUGH M. CALDWELL,
Corporation Counsel,
FRANK S. GRIFFITH,
Assistant,
Attorneys for Defendant.

Service of the within Motion for new trial by delivery of a copy of the undersigned is hereby acknowledged this 8th day of January, 1918.

FLICK & PAUL,
BOGLE, GRAVES, MERRITT &
BOGLE,
HUGHES, McMICKEN, RAMSEY &
RUPP,

Attorneys for Plaintiff.

[Endorsed]: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [28]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COMPANY, a Corporation,
Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation,
Defendant.

Order Denying Petition for New Trial.

In this cause the petition of the defendant for a new trial having been served and filed and submitted to the Court for consideration, it is by the Court ORDERED and CONSIDERED, upon due consideration, that said petition for a new trial be and the same is hereby denied, to which order the defendant excepts and its exception is allowed.

Done in open court this 10th day of January, 1918.

EDWARD E. CUSHMAN,

Judge.

O.K. as to form.

GRIFFITH.

[Endorsed]: Order Denying Petition for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [29]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Defendant's Proposed Bill of Exceptions.

BE IT REMEMBERED, that heretofore and on, to wit, the 3d day of December, 1917, the above-entitled cause came regularly on for trial in the above-entitled court before the Honorable E. E. Cushman, Judge of said court; plaintiff appearing by Messrs. E. C. Luccock of Bogle, Graves, Merritt & Bogle, E. H. Flick of Flick & Paul, and Otto B. Rupp of Hughes, McMicken, Ramsey & Rupp, its attorneys and counsel, and defendant appearing by Messrs. Hugh M. Caldwell and Frank S. Griffith, its attorneys and counsel; and a stipulation in writing waiving a jury having been signed by counsel for the respective parties and filed in this court, whereupon the following proceedings were had and done, to wit:

Counsel for plaintiff made an opening statement to the court, stating among other things the following:

“Mr. RUPP.—This is an action brought by the Lloyds Plate Glass Insurance Company against the City of Seattle, arising out of the following circumstances and facts: The Lloyds Plate Glass Insurance Company and the Globe Indemnity Company are both New York corporations engaged in the business of insuring plate glass in the City of Seattle and elsewhere. Sometime in the year 1915 [30] a scow containing about sixteen tons of dynamite was moored at one of the city's buoys in the City of Seattle somewhere near Harbor Island. At that time there was an ordinance of the City of Seattle providing for the maintenance of a powder maga-

zine or place in which powder might be stored, which ordinance provided that it should be stored at what is called the Harrison Street powder dock. There was in addition to that ordinance another ordinance of the City of Seattle, which is generally called I think the fire patrol ordinance, some sections of which will be material. And there is also, in addition to that, certain statutes of the State of Washington relative to the storage of explosives in cities. This dynamite remained there for a period of about fourteen days I think, and a charge was made by the City of a dollar a day for the storage of this dynamite at this place. It exploded on Sunday morning about two o'clock and broke a large amount of plate glass all around the town. As a matter of fact I think the effect of this explosion was felt as far as Everett. I think some slight damage was even done up there.

The COURT.—I know it woke me up in Tacoma.

Mr. RUPP.—The various insurance companies thereupon paid, or rather, as provided for by the terms of the policies, replaced the glass of those people who had policies of insurance, and the amount of that with the salvage of the glass deducted is the amount of the claim here in dispute.”

Thereupon, counsel for defendant made an opening statement, stating among other things, the following:

“Mr. GRIFFITH.—There is no liability on the part of the City of Seattle in any particular. The only question that can be is: Were we careless and negligent in fixing the [31] place where the trans-

fer of powder and the anchorage of powder should be? Were we negligent in doing that when perhaps, after experience, some safer place might have been chosen? But, had we anchored it at Blakeley Rocks across the Sound or had we anchored it across the Straits or had we anchored it anywhere, the results of that explosion would not have been any different. Lights were broken at Tacoma and lights were broken in Hillman City. Between Seattle and Hillman City there is a ridge of hills and the testimony will show the lights were all broken out and the glass in the streets. And we will show that, had this explosion occurred at the Harrison Street wharf, the result to life would have been appalling.”

Counsel for plaintiff thereupon offered in evidence a map of the waterfront of the City of Seattle, showing among other things the location of buoy No. 1 and the Harrison Street powder dock. This map was admitted in evidence without objection, marked “Plaintiff’s Exhibit 1,” and a copy is attached to this bill of exceptions, marked Exhibit “A” and made a part hereof.

Plaintiff thereupon offered and read in evidence the claim filed by the Lloyds Plate Glass Company, a corporation, with the clerk of the City Council of the City of Seattle, on the 29th day of June, 1915, a copy of which is attached to this bill of exceptions marked Exhibit “B,” and made a part hereof. This claim was received in evidence over the objection of the defendant that the claim did not show “that the various persons who suffered a loss or damage filed any claim or authorized anybody else to file any

claim for them against the City of Seattle," The objection was overruled by the Court and an exception noted and allowed. [32]

Plaintiff then offered and read in evidence one of the claims filed by the Globe Indemnity Company with the clerk of the City Council of the City of Seattle, on June 29, 1915, a true and correct copy of which claim is attached to this bill of exceptions, marked Exhibit "C," and made a part hereof. This claim was received in evidence over the objection of the defendant that the claim did not show "that the various persons who suffered a loss or damage filed any claim or authorized anybody else to file any claim for them against the City of Seattle." The objection was overruled by the Court and an exception noted and allowed.

It was then stipulated by and between counsel for the respective parties that thirty other claims were filed by the Globe Indemnity Company with the clerk of the city council of the City of Seattle, on June 29, 1915, which said claims, with the exception of the names of the owners of the plate glass, the amounts and numbers of the policies and the dates thereof, the streets and numbers at which the windows were situated and the numbers of windows and the amounts of damage, were identical with Exhibit "C." It was also stipulated and agreed that these claims should be considered in evidence; subject, however, to the same objection as was made to the admission in evidence of Exhibit "C." The objection was overruled by the Court, and exception noted and allowed.

Testimony of W. F. Zwick, for Plaintiff.

W. F. ZWICK was called as a witness on behalf of the plaintiff, and being sworn, testified as follows:

That he was the special agent, adjuster and inspector for the Lloyds Plate Glass Insurance Company of New York, and that he had been such for seventeen years, and was such on May 29, 1915; that in April, 1914, and at all times thereafter, the Lloyds Plate Glass Insurance Company was [33] incorporated in the State of New York, its home office being at 63 William Street, New York City; that it had been engaged in business in the State of Washington since 1892, and had complied with all the laws of said last-named State relative to corporations; that it had appointed a statutory agent for the State of Washington, and had paid its annual license fee last due.

At this time counsel for plaintiff offered in evidence without objection, and the same was admitted, a certificate of the Insurance Department of the State of Washington, which certificate stated that the Lloyds Plate Glass Insurance Company had paid its annual license fees from April 1, 1914, to March 31, 1918, and that during all of said time said Insurance Company was duly licensed and authorized to transact business in this State.

Continuing, Mr. Zwick testified that he knew that at the time of the explosion the Lloyds Plate Glass Insurance Company had policies of insurance on all the properties named in Exhibit "A" attached to Exhibit "B" herein, with the exception of the Men's

claim for them against the City of Seattle," The objection was overruled by the Court and an exception noted and allowed. [32]

Plaintiff then offered and read in evidence one of the claims filed by the Globe Indemnity Company with the clerk of the City Council of the City of Seattle, on June 29, 1915, a true and correct copy of which claim is attached to this bill of exceptions, marked Exhibit "C," and made a part hereof. This claim was received in evidence over the objection of the defendant that the claim did not show "that the various persons who suffered a loss or damage filed any claim or authorized anybody else to file any claim for them against the City of Seattle." The objection was overruled by the Court and an exception noted and allowed.

It was then stipulated by and between counsel for the respective parties that thirty other claims were filed by the Globe Indemnity Company with the clerk of the city council of the City of Seattle, on June 29, 1915, which said claims, with the exception of the names of the owners of the plate glass, the amounts and numbers of the policies and the dates thereof, the streets and numbers at which the windows were situated and the numbers of windows and the amounts of damage, were identical with Exhibit "C." It was also stipulated and agreed that these claims should be considered in evidence; subject, however, to the same objection as was made to the admission in evidence of Exhibit "C." The objection was overruled by the Court, and exception noted and allowed.

Testimony of W. F. Zwick, for Plaintiff.

W. F. ZWICK was called as a witness on behalf of the plaintiff, and being sworn, testified as follows:

That he was the special agent, adjuster and inspector for the Lloyds Plate Glass Insurance Company of New York, and that he had been such for seventeen years, and was such on May 29, 1915; that in April, 1914, and at all times thereafter, the Lloyds Plate Glass Insurance Company was [33] incorporated in the State of New York, its home office being at 63 William Street, New York City; that it had been engaged in business in the State of Washington since 1892, and had complied with all the laws of said last-named State relative to corporations; that it had appointed a statutory agent for the State of Washington, and had paid its annual license fee last due.

At this time counsel for plaintiff offered in evidence without objection, and the same was admitted, a certificate of the Insurance Department of the State of Washington, which certificate stated that the Lloyds Plate Glass Insurance Company had paid its annual license fees from April 1, 1914, to March 31, 1918, and that during all of said time said Insurance Company was duly licensed and authorized to transact business in this State.

Continuing, Mr. Zwick testified that he knew that at the time of the explosion the Lloyds Plate Glass Insurance Company had policies of insurance on all the properties named in Exhibit "A" attached to Exhibit "B" herein, with the exception of the Men's

(Testimony of W. F. Zwick.)

Bootery, F. L. Heidrich & Co., Cowley Investment Co., May Thagard, Outlet Clothing Co., Stengen & Ursditsky, Crawford & Wagner, Shibata Company, Ale Meister, Hans Graf (two policies), Cascade Gas & Electric Fixture Co., Oriental American Bank, Crescent Manufacturing Co., Muhl Store and Contractors Equipment Co. That with reference to the windows covered by the policies of insurance of which he had knowledge, the Lloyds Plate Glass Company in each and every instance replaced the plate glass, and then the plate glass company billed the Insurance Company for the value of the glass so replaced, less the salvage. [34]

Q. Is that correct? A. Yes, sir.

Q. Examining these amounts, can you state whether those are correct?

A. No, I would not say that. There were too many of them and there was too much of a turmoil at the time to get each specific amount, you know, because the dealer replaced the glass and then sent these on to the San Francisco office. Some came into my possession and some not.

Q. Are you able to identify any of these amounts?

A. Those exact amounts, no, I would not say that.

Q. Do you know the full amount paid by you to the plate glass company as the result of this explosion for the people named in that list?

(The list referred to is Exhibit "A" attached to Exhibit "B" herein.)

A. No, I would not swear to a single—as to the exact amount, because there are too many of them to figure on.

(Testimony of W. F. Zwick.)

Q. What I am asking you is: How much money did the Lloyds Plate Glass Company pay to these various plate glass people to restore this glass?

A. Nearly \$6,000.00.

The COURT.—If you are going to determine absolutely upon that matter, you had better fix the minimum amount.

A. I might state that I think there are some accounts that came in later that were not included in that, so I think it was over \$6,200.00, including those that are filed and those not filed.

Q. Well, what was the—as a matter of fact the amount paid outside of those that came in later to the [35] people named herein was not less than \$5,700.00. Isn't that correct?

A. I think it was over \$5,800.00.

Continuing, Mr. Zwick testified that the policies of insurance written by the Lloyds Plate Glass Insurance Company on the various properties named in exhibit "A" attached to exhibit "B" herein were in all respects identical with the exception of names, dates and amounts; that the policies must, by law, be all alike; that the form of policy attached to the amended complaint as exhibit "D" to said amended complaint was the form of policy used in each and every instance; (said form of policy attached to said amended complaint as exhibit "D" being hereby referred to and made a part of this bill of exceptions) and that at the time of the explosion all persons named in exhibit "A" attached to exhibit "B" herein had valid policies of insurance.

Testimony of L. D. Gilmer, for Plaintiff.

L. D. GILMER was called as a witness on behalf of the plaintiff, and after being first duly sworn, testified as follows:

That he had been engaged in the insurance business since 1887; that in May, 1915, he was the local resident agent of the Lloyds Plate Glass Company; that he, himself, had written policies of insurance on the Standard Furniture Company, northwest corner of Second and Pine Street, the Bon Marche, southwest corner of Second Avenue and Pike Street, Thos. M. Green, the Stadaker Bldg., 5th Avenue between Pike and Union, Butler Hotel Company, northwest corner of Second and James, H. N. Richmond, Virginia Hotel, 4th and Cherry, Herman & Blumenthal, 120 Second Ave., South, and Shafer Brothers, 92 Yesler Way. That to the best of his knowledge and belief, the amounts set opposite the names of the holders of the policies which he had written [36] were the values of the glass replaced less the value of the salvage of the glass recovered; that the glass was replaced as soon as possible after the explosion; that he was out of the city at the time of the explosion, but that he heard the explosion and came to Seattle the next morning; that nothing was done relative to the replacement of any of the glass insured by the Lloyds Plate Glass Insurance Company until he reached the City of Seattle; that while he did not measure the glass in order to determine the exact amount of the salvage, yet all windows that

(Testimony of L. D. Gilmer.)

showed any salvage at all he went around and looked at; that in fact the glass was all knocked out; that the glass was replaced just as soon as possible after the explosion; that the glass market was demoralized and so much glass had to be put in that all of it could not be put in immediately, and that some glass in the City of Seattle it was not possible to replace until the month of December, 1915.

Other witnesses who were agents of the Lloyds Plate Glass Insurance Company in May, 1915, were called on behalf of the plaintiff, and after being duly sworn, testified that they each had written policies of insurance on some of the properties described in said exhibit "A" to said exhibit "B" herein; that the policies so written by them, added to the policies written by the witnesses Zwick and Gilmer, constituted all the policies described in said exhibit "A" to said exhibit "B"; that the Lloyds Plate Glass Company after the explosion replaced glass, as provided for by said policies, of the value and the amount as set forth in said exhibit "A" to said exhibit "B" herein. No one of these witnesses testified that the total loss or damage sustained by the Lloyds Plate Glass Company was caused by the explosion [37] of the dynamite on the scow anchored at Buoy No. 1.

Testimony of L. V. Brewer, for Plaintiff.

L. V. BREWER was called as a witness on behalf of the plaintiff, and after being duly sworn, testified that he was a member of the firm of John Davis & Company, a corporation organized under the laws of

(Testimony of L. V. Brewer.)

the State of Washington; that John Davis & Company was the general agent of the Globe Indemnity Company, a corporation organized under the laws of the State of New York; that in 1914, and at all times thereafter, it was a corporation organized under the laws of the State of New York, with its home office at 45 William Street, New York City; that the Globe Indemnity Company was in May, 1915, and at all times thereafter, doing business in the State of Washington, and had complied with the laws of that state relative to foreign corporations doing business in such state, and that it had paid its annual license fee last due.

Counsel for plaintiff thereupon offered in evidence the original policy issued to Lennons, Inc., No. 334,362. A copy of this policy is hereto attached, marked exhibit "D" and by this reference made a part of this bill of exceptions.

Continuing, Mr. Brewer testified that the Globe Indemnity Company on May 30, 1915, had outstanding and in full force and effect the policies of insurance set forth in exhibit "E" hereto attached and made a part of this bill of exceptions. That all said policies were standard policies.

Q. Were those windows damaged by any explosion which took place in Seattle Harbor on the 29th of May of that year? A. Yes, sir.

Mr. GRIFFITH.—Does he know that of his own knowledge?

Q. Now, I hand you what is known as Plaintiff's Exhibit No. 8 (exhibit "E" herein) and I ask you if

(Testimony of L. V. Brewer.)

you know [38] whether or not the names of the individuals therein appearing, the numbers of the policies and the date of the issuance of the policies, and the amounts set opposite their names, are the policies referred to by you, and are those the amounts that were paid to these various policy-holders by reason of this explosion?

A. I believe so. I think I made up this list. I am familiar with all the names.

(“Plaintiff’s Exhibit No. 8” referred to in the preceding question is the same as exhibit “B” attached to the amended complaint, and exhibit “E” herein).

Mr. Brewer further testified that to each of the thirty-one claims filed by the Globe Indemnity Company with the clerk of the City Council on June 29, 1915, there was attached a bill of the glass company which had replaced the glass, each of which bills showed the value of the glass replaced, less the amount of the salvage.

Testimony of A. A. Paysse, for Plaintiff.

A. A. PAYSSE was called as a witness on behalf of the plaintiff, and, after being first duly sworn, testified as follows:

That he was now and had been for three and one-half years port warden of the City of Seattle; that he was such port warden in May, 1915; that he was familiar with buoy No. 1; that said buoy was marked by a circle on exhibit “A” attached to this bill of exceptions; that the City of Seattle placed buoy

(Testimony of A. A. Paysse.)

No. 1 in its present location in 1912; that buoy No. 1 was within the city limits of the City of Seattle, and within that part of the Seattle Harbor known as "Elliott Bay Anchorage"; that the scow containing 15 tons of dynamite was moored to this buoy on May 14, 1915, but that he did not know of it until the following morning, when he issued a permit to the Lillico Launch & Tow Boat Co., charterer of the [39] scow and agent of the owners of the dynamite, to moor to Buoy No. 1 a scow containing 15 tons of dynamite; that at the time he issued such permit, he knew that the scow had on board about 15 tons of dynamite; that the City made a charge to the Lillico Launch & Tow Boat Company for such anchorage of one dollar per day, which the tow boat company paid to the City; that he required the Lillico Launch & Tow Boat Company to maintain on the scow during the day a red flag conspicuously hoisted not exceeding twenty feet above the deck of the scow, such being International Code Flag B; that he also required the Lillico Company to maintain a light on the scow at night, and that the Lillico Company did maintain these signals; that the scow was anchored at buoy No. 1 from May 14th to May 30th, at which time the dynamite on the scow exploded.

Mr. RUPP.—Q. Do you know whether or not the dynamite on board the scow did explode?

A. I heard a very loud explosion and was there at the previous location of this scow, I presume, an hour after it occurred, and I assume that that was the powder that did explode.

(Testimony of A. A. Paysse.)

Q. Well, was there any of the scow or dynamite left?

A. Yes, there was a lot of rubbish there.

Q. Now, at the same time that this scow was moored there, was there another scow adjoining this dynamite—was there another scow moored at the same buoy?

A. There was a scow of coal lying at Buoy 5 which was moored to Buoy 1.

Q. Was it close alongside this particular barge containing the dynamite? [40]

A. It was.

Q. What happened to that coal?

A. It turned over and the scow remained upside down.

Q. That scow of coal was moored there after the dynamite was put there? A. Yes, sir.

Q. Just when, if you remember, was it that that scow of dynamite was placed at this particular buoy?

A. If I recollect rightly, it was there on the morning of the 15th of May.

The COURT.—How many days was this dynamite stored there at Buoy No. 1 before it exploded?

Mr. GRIFFITH.—I think about fourteen days.

A. Fourteen days, yes.

Q. I hand you a copy of the record of the port warden and ask you if, by referring to that, you can tell what date it was, that it was in fact moored there? (Handing paper to witness.)

A. It was there on the 14th and exploded on the 30th.

(Testimony of A. A. Paysse.)

Q. Mr. Paysse, how far away from the north end of Harbor Island is Buoy No. 1 where this scow was located?

A. Between twelve and thirteen hundred feet.

Q. How far from, say, Railroad Avenue?

A. It is about half a mile from buoy No. 1 to the shore along Railroad Avenue.

Q. Well, do you know whether or not that explosion caused the breaking of any glass in the downtown district of the City of Seattle?

A. I believe it did, yes. [41]

Q. Do you know how extensive the damage was that was done by that explosion? A. No, I do not.

Q. Do you know how far away the explosion was felt? A. That I know of positively?

Q. Yes.

A. Why, I saw glass on the street in the Pike Street District and all the way down until I got to pier 1. That is the territory that I covered immediately after the explosion.

Q. How far away was buoy 1 from, we will say, the down-town business section of the city?

A. Do you mean First, Second and Third Avenues?

Q. Yes, First Avenue.

A. Well, it would be the number of blocks that would be more than half a mile. I think my office on the face of pier 1 is very close to half a mile.

Q. From buoy No. 1?

A. From buoy No. 1. The dock is a thousand feet long and that would bring you to Railroad Avenue,

(Testimony of A. A. Paysse.)

and as many blocks as you would have to figure from there.

Q. And you would have two blocks between that and First Avenue? A. Yes, sir.

Q. Railroad and Western? A. Yes, sir.

On cross-examination by Mr. GRIFFITH, he testified [42] as follows: That most of the traffic in Seattle harbor comes around Duwamish Head by the bell buoy at West Seattle; that the Mosquito Fleet comes that way and makes for Colman Dock and pier 3; that none of this shipping comes within half a mile of buoy No. 1; that Harbor Island was a body of filled in land in Elliott Bay, and in May, 1915, was practically unoccupied. That the two precautions which it was necessary to take in ascertaining what was a safe place for the handling of high explosives were to keep it away from fire and from contact with people; that the dynamite in question had been shipped by the Hercules Powder Company from San Francisco, was brought to Seattle on the steamer "F. S. Loop"; that said steamer was engaged in the Coastal trade; that he was informed that the ultimate destination of the dynamite was Vladivostok, Russia; that he had also been informed that the dynamite was to be transported from Seattle to Vladivostok on the — Maru, but that said vessel could not take it; that it was then arranged that the "Robert Dollar" should carry the dynamite to Vladivostok, and that the "Dollar" was to sail on May 31st; that the Harrison Street powder dock was

(Testimony of A. A. Paysse.)

situated at the foot of Harrison Street in Seattle; that the — Maru sailed from Seattle about a week after the dynamite had been transferred from the “Loop” to the scow.

He further testified on cross-examination, as follows: That the Harrison Street powder dock was used in 1915 for the transfer of small quantities of explosives for interior consumption; that no dynamite or high explosive was ever transferred in interstate or foreign commerce at the Harrison Street powder dock; that the transfer of powder from one ship to another took place at the said buoy or in [43] the open right in front of Elliott Bay; that neither the port warden or the City of Seattle had anything to do with the scow on which it was transferred; that neither the City nor the port warden at any time exercised any authority or control over the scow or its contents after it was anchored to buoy No. 1, and that the City never had this dynamite “in storage of any kind, shape or description”; that the cost of installing a buoy was between eleven and twelve thousand dollars; that the income from buoy No. 1 during the year 1915 was an average of fifty-one cents a day; that the cost of its maintenance and upkeep was between \$150.00 and \$250.00 per year; that there is no place in Elliott Bay which was less subject to fire and more safe for the transfer of explosives than buoy No. 1; that the hill above the Harrison Street dock was heavily settled; that the Harrison Street dock was half a mile from Kinnear Park, and that the territory from the water clear

(Testimony of A. A. Paysse.)

back to the top of Queen Anne Hill near the Harrison Street dock, was thickly settled. All of this last-named testimony was admitted in evidence over the objection of counsel for plaintiff that the testimony was wholly irrelevant, incompetent and immaterial. The Court overruled the objection, and exception was taken and allowed.

On redirect examination, Mr. Paysse testified that the map introduced in evidence, and being exhibit "A" attached to this bill of exceptions, correctly showed the location of the various industrial plants within the vicinity of buoy No. 1 on May 30, 1915, with the exception that one or two plants such as Skinner & Eddy and Ames Shipbuilding Company, have been added since that time; that the Centennial Mills and Albers Mill were about one-half [44] mile from buoy No. 1.

Counsel for plaintiff then offered in evidence and same was received without objection, a contract of assignment between the Globe Indemnity Company and the Lloyds Plate Glass Insurance Company. A copy of this assignment is attached to the amended complaint, marked exhibit "C," and by this reference made a part of this bill of exceptions.

Counsel for plaintiff thereupon offered in evidence and same was read and admitted in evidence without objection, a power of attorney executed by the Globe Indemnity Company authorizing L. B. Brewer to execute the contract of assignment from the Globe Indemnity Company to the Lloyds Plate Glass Insurance Company.

Counsel for plaintiff thereupon offered in evidence and the same was read and admitted in evidence, without objection, Ordinance No. 34,379 of the ordinances of the City of Seattle, the material sections of which are as follows:

Section 1.

The City of Seattle in the exercise of its police power hereby assumes control and jurisdiction over all navigable waters within the City of Seattle over which the city has control and jurisdiction, and such waters shall, for the purpose of this ordinance, be known as "Seattle Harbor." [45]

Section 2.

The word "vessel" shall include ships, boats, steamers, scows, barges and other structures adapted to navigation or movement from place to place by water.

Section 4.

The master of every vessel entering the harbor between the hours of eight (8) o'clock A. M. and five (5) o'clock P. M. of any day, except Sundays and holidays, shall report to the port warden before five (5) o'clock P. M. of such day, and if entering the harbor between five (5) o'clock P. M. of any day and eight (8) o'clock A. M. of the next day shall report to the port warden at eight (8) o'clock A. M. of such next day, and if entering the harbor day or night upon any Sunday or legal holiday shall report to the port warden at eight (8) o'clock A. M. on the next legal day, stating name of vessel, master, tonnage, amount and nature of cargo, and such other information as may be required by the port warden;

provided, that these provisions shall not apply to vessels carrying cargoes or part cargoes of explosives, nor to coastwise vessels, nor to those plying between Puget Sound ports. [46]

“Section 7.

“All waters herein specified, subject to reservations for anchorage, shall be known as ‘fairway,’ and shall not be obstructed in any manner whereby navigation may be endangered or impeded, and shall include, subject to such reservations, the following described waters:

“All of Elliott Bay, lying easterly of a straight line drawn from Alki Point to West Point;

“All of the East and West Waterways;

“All of the Duwamish River;

“All of the Duwamish waterway project;

“All of Salmon Bay;

“All of Lake Washington Canal, outside that portion which shall be under the supervision and control of the United States government;

“All of Lake Washington, Lake Union and Green Lake, lying or being within the corporate limits of the city of Seattle or within the jurisdiction and control of the city;

“All that portion of Shilshole Bay, lying easterly and southerly of a line from West Point to the intersection of the northerly boundary of the City of Seattle with the outer harbor line.

“All navigable waters in the projection of public streets, lying on the landward side of the outer harbor line shall be fairway. It shall be unlawful for the master, or other person in charge of any vessel,

to anchor, tie or make fast such vessel in any such fairway for a longer period of time than reasonably sufficient to load or unload the same, except that the port warden may, in his discretion, grant any permit for the use of any such fairway for a longer period of time whenever in his judgment such use will not interfere [47] with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for."

"Section 8.

"In aid of commerce and navigation anchorage for vessels is authorized in the following described waters:

"Elliott Bay Anchorage—Beginning at the northeast corner of Harbor Island; thence northerly and in a straight line to a point intersecting a line drawn along the north side of King Street; thence west on said line to a point intersecting the east line of the West Waterway; thence along said east line to the northwest corner of Harbor Island; also, beginning at a point of intersection of the outer harbor line with a straight line drawn along the west line of the West Waterway; thence north to a point intersecting a straight line drawn along the north side of Washington Street; thence in a westerly direction to the junction of the outer harbor line and the east side of the West Seattle Ferry dock."

"Section 9.

"It shall be unlawful for any master or person having charge of any vessel to anchor or make the same fast in the waters of the fairway or anchorage, without first obtaining a permit therefor from the

port warden and paying anchorage as follows:

“Anchorage at city buoys—Every vessel attached to any city buoy shall pay as follows:

“Vessels under 500 tons, each day or part thereof \$1.00.

“The port warden shall have power, and it shall be his duty, to remove any vessel from any buoy, wharf or anchorage [48] for nonpayment of any fees required by this ordinance, and the cost of such removal, together with the cost of any accidents arising therefrom, and the amount of such fees, shall be recovered by the City of Seattle against such vessel or the master thereof.”

“Section 16.

“It shall be unlawful for the owner or master of any vessel to allow the same to remain anchored or moored or made fast to or lie at any pier, unless there shall be on board such vessel at all times a competent watchman.”

“Section 19.

“It shall be unlawful for any person to handle or store on any pier, other than a pier specially designated for such purposes, any explosive, outside packages containing in the same compartment interior packages the mixtures of whose contents would be liable to cause danger, evolution of heat, gas or corrosive materials; cylinders containing gases capable of combining chemically; packages containing dangerous articles in a leaking condition or in such an insecure condition as to make leakage probable during transit; rags or cotton waste oily with more than five (5) per cent of vegetable or animal oil, or wet

rags; charcoal screenings from wet charcoal or wet screenings or screenings that have been wet, iron sponge and spent oxide that has not been properly oxidized during manufacture.”

“Section 33.

“No master, or other person in charge of any vessel or obstruction, shall attach the same to any city buoy until he shall have obtained permission so to do from the port warden; provided, that during the night or in bad weather such vessel or obstruction may be attached to any vacant [49] city buoy, but the master, owner or person in charge thereof shall notify the port warden not later than eight (8) o'clock A. M. of the next legal day of such act, stating the name and character of such vessel or obstruction and the probable length of time it is desired to remain at said buoy. Should more than one vessel or obstruction apply for the use of any particular buoy, the port warden shall be the sole judge as to which shall occupy the same, and his decision shall be final and conclusive.”

“Section 38.

“Every vessel engaged in the transfer of any explosive from one vessel to another within Seattle Harbor, shall come to an absolute stop before beginning such transfer and shall not move its propelling machinery during any time that such explosive is being transferred, and during all the times of such transfer each such vessel shall have on board a written permit from the port warden to make such transfer, and each such vessel shall have conspicuously displayed where it can best be seen from any

point of the horizon the powder flag or International Code Flag 'B.'

"Every vessel approaching or passing any vessel engaged in the transfer of explosives and from which are displayed the powder flag hereinbefore required, shall slow down to a speed not exceeding six (6) nautical miles per hour before coming abreast of such vessels so transferring explosives and in time to prevent accident by reason of swells.

"Every vessel lying at any powder dock or at anchor within Seattle Harbor, which has a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives, in any form, shall, between sunset and sunrise display at some point not [50] exceeding twenty (20) feet above the hull of such vessel one red light in a lantern so constructed as to show a clear uniform and unbroken light visible all around the horizon at a distance of at least one mile, and every such vessel in or upon any part of Seattle Harbor between sunrise and sunset carrying any such explosive or explosives shall display from a conspicuous hoist, and visible all around the horizon, a red flag, being the International Code Flag 'B.'

"No person shall on any pier, or other structure, except on the powder dock or on powder boats, within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite or other like explosive, either by day or night.

"No vessel with a cargo, or part cargo, of powder, ignition caps, dynamite or other like explosive, arriving at Seattle Harbor, shall lie alongside of or

make fast to any pier until the port warden shall have issued a written permit so to do.

“No person shall handle any leaking or damaged package of explosive, or packages of explosives which shows excessive dampness or shows mold or shows signs of any oily stain or other indication that the liquid part of such explosive is not perfect, or that the amounts of liquid part is greater than the absorbent can carry, either at the powder dock or at any other place in Seattle Harbor.

“No vessel carrying a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive in any form, shall come to or lie at any pier in Seattle Harbor between sunset and sunrise, except at the powder dock, and then only when a written permit to lie [51] thereat shall have been obtained from the port warden.

“Any vessel desiring a permanent berth at the powder dock for the transfer of powder shall pay to the port warden a minimum charge of twenty-five (25) dollars per month when such vessel does not exceed fifty (50) net tons, which shall allow such vessel to lie thereat and discharge or handle in any one month not over twenty-five (25) tons of explosives over the same. Whenever any vessel shall handle more than twenty-five (25) tons of explosives over such dock in any one month the regular one (1) dollar per ton rate shall be collected in lieu of said twenty-five (25) dollar rate.

“Every powder boat engaged in the transfer or handling of explosives and lying at the powder dock for such purpose, or for the transfer of explosives

direct to vessels on the day of departure as permitted herein, shall have on board a written permit from the port warden known as a 'Monthly Powder Permit.' The port warden shall collect two (2) dollars for each monthly powder permit and the terms of the permit shall comply with the provisions of this ordinance, which permit may be revoked by the port warden for cause without notice.

"Smoking is absolutely prohibited on the powder dock, and on every vessel lying thereat, and on every powder boat and on every vessel to which explosives are being transferred in Seattle Harbor.

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a city buoy, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew, which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency [52] requires, or when required by the port warden.

"No explosive of any kind shall be handled or transferred from or to a powder boat, powder dock or other vessel by means of any power device, or in slings, or by sliding down chutes, or planks, or gangways, but shall be handled only by hand.

"Whenever artificial light is necessary or is used on the powder dock, on any powder boat or on any vessel engaged in the transfer of explosives, only incandescent electric lights shall be used, and no open light of any description, whether oil lights or otherwise, shall be used or maintained in any manner.

"Every vessel, whether lying at anchor or at a city

buoy or in any other position within Seattle Harbor, engaged in the transfer of explosives, shall have on board at the time of such transfer a written permit therefor from the port warden, which permit shall state the time and place of such transfer and the amount of explosives to be handled.

“Except as otherwise in this ordinance provided, the port warden shall collect the sum of fifty (50) cents for each and every explosive permit issued by him; provided, permits issued to the United States government under the provisions of this ordinance shall be free of charge.

“When, in the judgment of the port warden, any person to whom any permit has been issued under the provisions of this ordinance for the handling of explosives, shall have violated any of the terms of such permit, it shall be his duty to revoke said permit forthwith.”

“Section 39.

“The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling [53] of powder, dynamite and other like explosives, and as a place for vessels carrying as cargo, or part cargo, such explosives. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden.

Section 43.

The master, owner or other person in charge of any vessel made fast to any pier, or other structure owned by or under the authority and control of the City of Seattle, and any vessel lying at anchor in

Seattle Harbor, or any vessel lying at any pier, obstructing any slip, fairway, or other vessel, shall, when requested by the port warden to change position, immediately proceed as requested or directed. Any failure, neglect or refusal to comply with such request or order shall make it the duty of the port warden to move such vessel, or cause the same to be moved, and the expense of such removal shall be paid by the master, owner or other person in charge thereof, or by said vessel.

Section 54.

Every vessel, or person in charge thereof, shall pay to the port warden at his office and before such vessel shall leave her berth, the amount due the city for tolls, wharfage, buoyage, anchorage, water, or any other charges, and failures so to pay shall authorize the port warden to refuse the use of any municipally owned pier until such vessel, or person, has paid the amounts due the city in full.

Counsel for plaintiff thereupon offered in evidence Sections 22, 24, 26 and 27 of Ordinance 28324 of the Ordinances of the City of Seattle, known generally as the "general fire patrol ordinance," which said sections are as follows: [54]

"Section 22.

"It shall be unlawful for any person, firm or corporation, whether licensed or not, to keep, store, or have on hand, within the limits of the City of Seattle, between the hours of 6 P. M. and 7 A. M., any dynamite." . . .

"Section 24.

"All explosives to be removed beyond city limits

at night; Provided, however, that the provisions of this section shall not apply to the master or other person in charge of any steamboat, vessel or railroad car transporting any such powder, dynamite or explosive substances to or from the City of Seattle in accordance with the provisions of this ordinance, except as hereinafter provided."

"Section 26.

"Every master or other person in charge of any steamboat, vessel or other water craft, having on board any of the explosive substances mentioned in the preceding sections, shall, immediately upon arriving in the harbor of the City of Seattle, and before landing at any wharf or dock, notify the harbor master, in writing, of the arrival of such . . . water craft within the harbor, the amount of such explosives on board and the name of the consignee and the place of destination thereof, and obtain from the harbor master a permit to land such explosive substances, which permit shall specify the dock or wharf where such explosive substances may be landed, and the time when the same shall be unloaded, which time shall begin not less than 6 hours after the issuance of such permit, and a copy of such permit shall be by such master or other person having charge of such . . . , water craft, immediately, and before such landing is made, given to the chief of the Fire Department of the City of [55] Seattle at the office of the Chief of the Fire Department. * * * All such explosive substances shall be discharged, landed or unloaded under the supervision of the Chief of the Fire Department, and shall

be immediately transported to some point without the limits of said city, and in case of failure on the part of the consignee, owner or other person having charge of such explosive substances to transport the same outside the limits of the city as hereinabove provided, the same shall be transported by the Chief of the Fire Department, or by some person by him appointed, at the expense of such owner or consignee.

Section 27.

It shall be unlawful for any person, firm or corporation to leave, deposit or store in any part of the City of Seattle, during transit, any of the explosive substances mentioned in the foregoing sections, except at a wharf or railroad depot for immediate shipment.

To the introduction of these sections of said Ordinance No. 28,324 counsel for defendant objected as follows:

Mr. GRIFFITH.—I want to object to that on the ground that it is wholly immaterial and that it has no bearing on the case at all. It is relative to the fire hazard in the City of Seattle and not relative to the transfer of explosives in commerce.

The Court overruled the objection, and an exception was taken and allowed.

There was also offered and read in evidence by the plaintiff, without objection, Section 10 of Article IV of the Charter of the City of Seattle, which said section is as follows:

“Every legislative act of said City shall be by ordinance. Every ordinance shall be clearly entitled and shall contain but one subject, which shall be

clearly expressed in its [56] title. The enacting clause of every ordinance shall be: 'Be it ordained by the City of Seattle as follows: ' "

There was also offered in evidence by the plaintiff without objection Section 18 of Article IV of the Charter of the City of Seattle, the material portions of which section are as follows:

"Sec. 18. The city council shall have power by ordinance and not otherwise—

"To make regulations for the prevention of accidents by fire, to organize and establish a fire department, to provide fire engines and other apparatus, and to provide for the prevention and extinguishment of fires and to regulate or prohibit the transportation, keeping or storage of all combustible or explosive materials within the corporate limits of the city, and to restrain and regulate and prohibit the use of fireworks."

"To control, regulate and prohibit the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation."

"To fix the rate of wharfage, storage and dockage, and to provide for the collection thereof, and to provide for the imposition and collection of such harbor fees as may be consistent with the laws of the United States."

There was also introduced in evidence by the plaintiff without objection Section 1 of Article VIII, and sub-division five of Section 5 of Article VIII, of the Charter of the City of Seattle, which provisions are as follows:

"Section 1. There shall be, and is hereby created,

a board of public works which shall consist of six (6) members, to wit: (1) The city engineer; (2) the superintendent of streets and sewers; (3) the superintendent of waterworks; (4) the superintendent of lighting; (5) the superintendent of buildings; (6) the superintendent of [57] public utilities.”

“Sec. 5. The board is hereby authorized and empowered, and it is hereby made its duty, subject to the provisions of the city charter, and saving to the city council such powers as are given to it in this charter:

“Fifth. To have the control, management, building, repairing and the direction of all wharves, docks, bridges, viaducts, landings, slips, boats and other structures which shall be building or owned by the city.”

There was also offered in evidence by the plaintiff without objection on the part of the defendant Article XII of the Charter of the City of Seattle, which said Article XII is as follows:

“Article XII.

“THE HARBOR DEPARTMENT.

“Section 1. Council to Control Harbor and Water Front:—The city council shall, unless otherwise prescribed by the laws of the state, exercise control and management of the harbor and water front of the City of Seattle, and shall, by ordinance, establish such rules and regulations as shall prevent any encroachment upon the *tital* area of the same.

“Sec. 2. Construction and Repair of Wharves:—The construction of all wharves which may be built by the city, and all repairs on the same, or other work

done on the water front by the city, shall be performed by the board of public works, after proceedings had in the manner and form prescribed for the construction, improvement and repair of public buildings.

“Sec. 3. Regulation of Wharves and Wharfage: The city council shall, by ordinance, regulate the tolls for wharfage, dockage and other charges at all wharves, slips, docks and landing places within the city, and provide for [58] the regulation of berths and landing of all steamers, sail vessels, barges or other water craft, and shall exercise in regard to all such wharves, slips, docks and landing places such other control not herein specified as shall not be inconsistent with the laws of the United States and of the State of Washington.

“Sec. 4. Wharves, Docks, Slips and Landing Places in Streets:—The city council may by ordinance order the construction of wharves, slips, docks or landing places upon any streets abutting upon or leading into any navigable waters within the city, which wharves, slips, docks and landing places, when so constructed, shall remain under the exclusive control of the city.

“Sec. 5. Port Warden:—The mayor, by and with the advice and consent of the city council, shall appoint a port warden, who shall perform such duties not inconsistent with this charter, in relation to harbors and wharves, as may be prescribed by ordinance, and who shall be deemed the head of the harbor department.”

Thereupon the plaintiff rested. [59]

Whereupon, counsel for defendant made the following motion for nonsuit:

“Mr. GRIFFITH.—Assuming that this testimony is before the court, the City at this time desires to move for a nonsuit, first on the ground that there is no testimony whatever showing any negligence on the part of the City of Seattle in permitting this anchorage at buoy No. 1—absolutely no testimony, not even a suspicion that it was negligent in that act. Second, the court will take judicial notice that while explosives are articles of commerce, as such they are not nuisances *per se*. Transportation of dynamite and those things which are not forbidden by Act of Congress are recognized as articles of commerce, and their transportation does not constitute a nuisance. There is no testimony here to show that the anchorage of this dynamite while it was in transit from the Hercules Powder Company of San Francisco to the consignees of Vladivostok was a nuisance in any sense of the term. The testimony affirmatively shows that it was in transit in commerce between San Francisco and Vladivostok through the port of Seattle.

That there is no testimony warranting any recovery, and that no proper claim has been filed with the City of Seattle.”

This motion was denied by the Court, to which counsel for the defendant excepted, and the exception was allowed. [60]

Testimony of James S. Gibson, for Defendant.

Whereupon the defendant, in order to sustain the issues in its behalf, called JAMES S. GIBSON as a witness, who, after being duly sworn, testified as follows:

That he was the manager of the International Stevedoring Company; that he had had twelve years' experience as a shipping master, and twenty-one years' experience as manager of a stevedoring company; that during that time he had handled large amounts of dynamite, but that he was not familiar with the contents of dynamite or its manufacture; that he was familiar with the location of the Harrison Street powder dock and with the location of all the buoys in the Seattle Harbor.

“Q. Now, Captain Gibson, from your experience as a shipping man in the handling of high explosives as the manager of this stevedoring concern, concerning the handling of dynamite of this character, would you say that buoy No. 1 was a safe place?

A. Absolutely.

Mr. RUPP.—Now, if the Court please, I object to that on the ground that it is immaterial, incompetent and irrelevant. In the first place, it is an attempt to show that buoy No. 1 is a safe place, and to that we say that the city itself has appointed a place at which the dynamite might be stored, and it does not make any difference, from that aspect of the case, if there were a thousand other safe places in Seattle Harbor for the storage of that dy-

(Testimony of James S. Gibson.)

namite as the Harrison Street dock was the only place at which this might be stored. In addition to that, I object to his testimony upon the ground and for the reason that I do not think that he is qualified as an expert.

The COURT.—I think upon the general issue of negligence [61] raised by the complaint this testimony may be material, but with reference to a nuisance *per se*, it is immaterial on that issue. The objection will be overruled.

Mr. RUPP.—To which I except.

The COURT.—Exception allowed.”

He further testified, over the objection of counsel for plaintiff, that the testimony was irrelevant, incompetent and immaterial:

That if the fifteen tons of dynamite had exploded at the Harrison Street dock, it would in his opinion, be impossible to estimate the damage that would have been done, but that such damage would have been undoubtedly very much more serious than the damage arising from the explosion at the buoy; that there were a number of people living near the Harrison Street powder dock. That it was the custom in 1915 in Seattle Harbor in transferring dynamite from vessels coastwise to vessels foreign “to take it alongside—away from the dock—either at buoys or at anchor away in the harbor, or adjacent thereto.” This method is pursued to avoid the dangerous consequences of handling dynamite alongside of the docks.

(Testimony of James S. Gibson.)

On cross-examination, by Mr. RUPP of counsel for plaintiff, the witness testified as follows:

That he had handled all kinds of explosives which were being shipped for war purposes; that he had not had any accidents of any kind; that he had no knowledge of any explosion except the one which gave rise to this controversy, but that he knew that dynamite was a good thing to be careful of.

Whereupon counsel for plaintiff moved to strike all the testimony of Mr. Gibson, upon the ground that he had not [62] shown that he was competent to testify as an expert; which motion was denied, and an exception taken and allowed.

Testimony of G. H. Adair, for Defendant.

G. H. ADAIR was then called as a witness on behalf of the defendant, and, after being first duly sworn, testified as follows:

That he had been directly engaged in the business of handling high explosives for twenty-four years; that he was familiar with the explosive known as 90% nitro-glycerin gelatin content and that it was commonly known as dynamite of one class; that to a great extent he was familiar with its characteristics; that the things which are most sought to be prevented with reference to high explosives are, first, to isolate it as completely as possible from fire, and, second, from the human element of carelessness; that it requires a fire or a detonator to make such dynamite explode. That he knew about where Buoy No. 1 was located.

(Testimony of G. H. Adair.)

He further testified, over the objection of counsel for plaintiff that the following testimony admitted in evidence was irrelevant, incompetent and immaterial (which objection was overruled by the Court, and an exception taken and allowed):

That Buoy No. 1 was a safe place for the anchorage of vessels containing dynamite and that he did not know of any place which could be selected that would be safer; that he was familiar with the Harrison Street dock; that the dock at the time of the trial was used for the city pound; that in 1915 it was known as the powder dock and was used for distributing small shipments that were necessary to be brought through the limits of the City of Seattle, that is, for consumption in and about Seattle, and for transfer to railroads. There was no storage at that time in the City of Seattle. That none of the foreign shipments handled by him were handled [63] at the Harrison Street dock. That he would not have given consideration to the storing of fifteen or sixteen tons of dynamite at the Harrison Street dock; that he would not store any powder upon any land.

On cross-examination, by Mr. RUPP, he further testified:

That he did everything from the testing and demonstrating to the selling end of dynamite; that he handled the entire business of the Giant Powder Company in the Northwest; that he had never had any personal observation of an accidental explosion

(Testimony of G. H. Adair.)

of the magnitude of the explosion which occurred on May 30th; that he had witnessed at three different times intentional explosions of seventeen tons of dynamite. That he had himself been in charge of explosions of dynamite, but that the amounts exploded were not large. That he had never brought any large amounts of dynamite to the city of Seattle. That transshipments of dynamite prior to May 30, 1915, were made in the harbor of the city of Seattle from vessel to vessel.

He further testified, over the objection of counsel for defendant that the testimony was irrelevant and immaterial, which objection was overruled by the Court,—and an exception taken and allowed.

That since the explosion on May 30, 1915, transfers of dynamite had been made outside a line extending from a point 1,000 feet off Fauntleroy to a line intersecting at 1,000 feet off Alki Point, from there in a direct line to a point 1,000 feet off West Point and from there practically to the city limits on the north. That he believed that this line was clear outside of Elliott Bay, but that there were people living within 1,000 feet of the line above described, as such [64] line was only a little over 1,000 feet from Magnolia Bluff.

On redirect examination, he testified that if sixteen tons of dynamite exploding in Seattle Harbor at buoy No. 1 would break glass in Snohomish City and in Everett, some 33 or 34 miles away, he did not think the result would have been any different if the same amount of dynamite had exploded out-

(Testimony of G. H. Adair.)

side of the fairway, but that it was a thing which nobody could tell, because explosives are all freakish and the action is not direct from the explosion.

Testimony of John H. Wilman, for Defendant.

JOHN H. WILMAN was then called as a witness on behalf of the defendant, and, after being first duly sworn, testified as follows:

That he was in the employ of the Dupont Powder Company and had been engaged in the powder business for twenty-eight years in both manufacturing and selling powder. That he was familiar with the character and manufacture of nitro-glycerin gelatin content 80% or 90%; that it was a very powerful explosive, slightly less sensitive than the ordinary dynamite of commerce. That the things to be most guarded against in its handling were fire and isolation from traffic. That he was fairly familiar with the streets and waterfront of the city of Seattle. That buoy No. 1, in his judgment, was 1300 feet from Harbor Island, which was the nearest point of land that he knew of to the buoy. That there was no storage in the city of Seattle for dynamite in quantities of fifteen tons. That to explode dynamite of the character of that on buoy No. 1 requires fire and vibration. [65]

He further testified, over the objection of counsel for plaintiff (which objection was overruled by the Court, and an exception taken and noted) as follows:

“Q. Was buoy No. 1 a proper place to store and transfer dynamite?

(Testimony of John H. Wilman.)

A. It was, for such purposes as use was granted to us.

Q. If you, Mr. Wilman, were asked—having the knowledge of these explosives and the experience you have had with them—to fix a place in the bay for the mooring of vessels containing a high explosive of this kind and for their transfer, would you select buoy No. 1 as a safe place?

A. I would consider it such.

Q. Now, with your experience, would you consider for a moment the anchoring or tying up to a wharf in the city of Seattle the quantity of dynamite that was on that scow—of the kind that was on it?

A. I would not consider it safe and particularly at that time."

On cross-examination, by Mr. FLICK of counsel for the plaintiff, the witness testified:

That the danger of explosives is relative. It is extremely doubtful that if the explosion had taken place beyond the fairway, that is, the line extending from Alki Point to West Point lighthouse, the damage would have been any less, for the reason that the hills at Alki Point and Magnolia Bluff would have thrown the action of the dynamite right towards the city, whereas, under the conditions then prevailing, it was a sort of side action; that greater safety lay at the point in Elliott Bay, where the scow was located, because it had a chance to spread towards the open way; that [66] the force of the explosion would travel along the line of least resist-

(Testimony of John H. Wilman.)

ance; that if the dynamite were situated up against a hill "it would leave the worst phases of its power on the surface of the hill and along the surface of the ground up the hill." With reference to this particular explosion, however, the force would spread across towards the open space, and if the dynamite had been placed beyond the fairway, all the force would have been coming towards the city of Seattle. That dynamite operates in its immediate locality equally in every direction. The reason that we do not see the evidence greatest at the point of least resistance is because there is nothing at that point to resist it, there is nothing there to leave any evidence. That if there was a hill between the place where the dynamite exploded and a city, the effect upon the city would be determined by the abruptness of the hill. That a line running to the northeast from this buoy a mile long would reach or cross a number of railroad tracks; "whether it would be the bulk of the tracks entering the city of Seattle, I do not know." I doubt if the terminal trackage terminating in the two depots in the city of Seattle is within a mile of this buoy No. 1.

On redirect examination, by Mr. GRIFFITH of counsel for defendant, the witness testified as follows:

That he was familiar with the territory around the Harrison Street powder dock; that along the hill above the dock it was pretty thickly settled with residences.

He further testified, over the objection of counsel

(Testimony of John H. Wilman.)

for plaintiff that the following testimony was incompetent, irrelevant and immaterial (an exception having been taken and noted)—that an explosion of this amount of dynamite at the [67] Harrison Street powder dock would have been extremely dangerous to the residences and that the opportunity for loss of life would have been large. That he doubted that if dynamite of the kind in controversy had exploded beyond the fairway, the action would have been the same, for the reason that dynamite travels along water with more rapidity and certainty. That on the night of the explosion the water was as quiet as he ever saw it on Puget Sound, that there was just the barest movement of the water.

On recross-examination, by Mr. FLICK of counsel for plaintiff, the witness testified as follows:

That the explosion occurred about two o'clock in the morning. That immediately thereafter one of the salesmen of the Dupont Powder Company, who was stopping at the Butler Hotel, called him (Wilman) up and informed him that there had been a terrific explosion upon the waterfront, and that the salesman thought it was the boat of the Dupont Powder Company. That Wilman and the salesman then took an automobile and drove to Harbor Island and as far as they could thereon, stopping "within 1500 feet of the remains of the scow." That they arrived there about twenty-five minutes after the explosion. When they arrived at the point just mentioned, they were told by an employee of a saw-

(Testimony of John H. Wilman.)

mill on Harbor Island that "a couple of scows had exploded."

“Q. Where was your boat laying at the time?

A. Our boat was laying at that time we found, just off the foot of Harrison St. Dock.

Q. And was it loaded with dynamite?

A. No, it was not loaded with dynamite. The capacity of our boat is 40 tons.

Q. What is that?

A. The capacity of our boat is 40 tons. It had on it about 1900 lbs. of stump powder. [68]

Q. Did it have on board dynamite?

A. Dynamite is a kind of stump powder.

Q. Lying off the Harrison St. dock?

A. Yes, sir.

Q. Who permitted it to go in there?

A. Why, it is the dock specified by the Port Warden to approach.

Q. And you were put there by the Port Warden at that time, weren't you? A. Yes, sir.

Q. Now, isn't it a fact that before you started out your clerk or your employees told you that it was not your boat that had exploded?

A. No, he did not. He told me that he had tried to get the Chief of Police to find out what it was. He didn't know what it was when he went with me.

Q. This buoy is a mile and a half or two miles from the Harrison St. Dock, isn't it? A. I think it is.

Q. And the moment you set foot on the vessel, boat or launch to go to buoy No. 1 you knew you were going in a different direction than if you were going

(Testimony of John H. Wilman.)

to the Harrison St. Dock?

A. I didn't set foot in a vessel.

Q. How did you get over there?

A. We went in an automobile.

Q. You knew instantly, when you went south instead of going northward, that you were going to a place other than your boat?

A. He gave me the opinion—

Q. Just answer that question.

A. He gave me the opinion that the explosion was south and we went there. We didn't know whether our boat had gone around there or not.

Q. You knew long before you reached Harbor Island, Mr. Wilman, that it was not your boat that had the explosion?

A. No; we didn't know until a party there at the mill said it was those scows.

Q. What mill? A. A sawmill there.

Q. On Harbor Island? A. On Harbor Island.

Q. Approximately a mile and a half from this particular buoy? A. No, sir.

Q. A mile?

A. We rode as far as we could on a roadway there and we were within 1500 feet of the remains of the scow—

Q. Yes.

A. —and we were told by an employee of that mill there that there had been an explosion there. We said, 'What was it,' and he said that there was a couple of scows there that had exploded.

(Testimony of John H. Wilman.)

Q. Up to that time you were riding with the Chief of Police?

A. No, sir. Riding in an automobile that we picked up at the Butler Hotel.

Q. Up to that time you didn't know whether it was your vessel or not, and at that time you mean to say now, Mr. Wilman, that you didn't know that your vessel was anchored at the Harrison St. Dock?

A. Well, a vessel that moves around—it came in from Pt. Angeles that morning some time— [69]

Q. Yes?

A. —and when I was told that it was our boat I said it was impossible because 'she is at Port Angeles or on her way from there,' and we went up there to that dock—we went from Harbor Island to that dock.

Q. Hadn't you known that she had been anchored at the Harrison St. Dock?

A. No. At nightfall the last report I had on her was that she was there at Pt. Angeles or on her way to Seattle.

Q. What other explosive did that vessel have at that time? A. How is that—our vessel?

Q. Yes.

A. No other explosive than the 1900 lbs. of stump powder. She had been on a voyage and had discharged her cargo and she came in to get orders and she was going out to our plant.

Q. Where had she discharged?

A. She had discharged at Bellingham, at a place called Utsalady, at Pt. Williams and Pt. Angeles.

(Testimony of John H. Wilman.)

Q. And she was lying here with this same type of stuff that is in issue here?

A. Not this same type of stuff. With a low form of dynamite, only stumping powder.

Q. Stumping powder? A. Yes, sir.

Q. Did you find out at that time if the Port Warden had designated the wharf?

A. He issued permits to come there.

Q. Do you pay a license or do you—

A. Every time; he never overlooks that.

Q. What is that? A. Every time.

Q. You pay rental?

Mr. GRIFFITH.—We object to that as not proper cross-examination. It is wholly immaterial.

The COURT.—Objection sustained.

Re-redirect Examination.

(By Mr. GRIFFITH.)

Q. Your boat was not tied up at the Harrison St. Dock. It was anchored in the bay off the dock?

A. Anchored off the dock.

Mr. FLICK.—What is that?

A. Anchored off the dock.

Q. In the bay? A. Yes, sir.

Q. And that boat is a boat used for local shipments?

A. It delivers small local lots of explosives.

Mr. GRIFFITH.—That is all.

Re-recross-examination.

(By Mr. RUPP.)

Q. How far off, about—how far off?

(Testimony of John H. Wilman.)

A. About a 1000 feet as near as I can remember it.

Q. You saw it that night?

A. No; it was not at night. It was in the morning.

Q. Well, what time in the morning?

A. I judge it was five o'clock by this time.

Mr. RUPP.—That is all." [70]

Thereupon Mr. Griffith offered in evidence, over the objection of counsel for plaintiff on the ground that the testimony was immaterial (which objection was overruled and an exception taken and noted), the following section of the regulations of the Interstate Commerce Commission of 1914, which section is as follows:

"Section 1503. High explosives are all explosives more power than ordinary black powder, except smokeless powders and fulminates. Their distinguishing characteristic is their susceptibility to detonation by a blasting cap. Examples of high explosives are the dynamites, picric acid, picrates, chlorate powders, nitrate of ammonia powders, dry trinitroto luol, dry nitrocellulose (gun cotton), and fireworks that can be exploded *en masse*." [71]

Testimony of W. C. Dawson, for Defendant.

W. C. DAWSON was thereupon called as a witness on behalf of the defendant, and, after being first duly sworn, testified as follows:

That he had been for twenty years a steamship agent and operator; that as such agent and operator he had handled high explosives; that for a period of the last ten years his company had carried high

(Testimony of W. C. Dawson.)

explosives between San Francisco and Puget Sound almost continuously. That he was familiar with the location of buoy No. 1 and with the Harrison Street powder dock.

“Q. What would you say as to the safety of buoy No. 1 for the transferring of explosives such as are in issue here and as to the anchorage of boats or vessels carrying that explosive at that buoy?”

Mr. RUPP.—To which we object on the ground that it is incompetent, irrelevant and immaterial, and for the further reason that this man has not been shown to be an expert. The mere fact that a man is in the steamship business—

The COURT.—Objection overruled.

Mr. RUPP.—Exception.

The COURT.—Exception allowed.

A. I consider it a very proper and safe place for the exchange of explosives from one vessel to another.

Q. And to anchor boats? A. Yes, sir.”

That from a steamship operator's point of view, carefulness is the thing which must be taken into consideration in the handling of explosives.

On cross-examination, by Mr. FLICK of counsel for the plaintiff, the witness testified as follows:
[72]

That it was one of the regulations that dynamite should be handled by hand rather than by mechanical device; that while he could not say he had any expert knowledge about it, he supposed the purpose

(Testimony of W. C. Dawson.)

of this regulation was to require the exercise of care. That he had no scientific knowledge of the ingredients that make up dynamite or nitro-glycerin. That up to the time of this explosion he had only handled a very few small shipments at the Harrison Street dock; that his recollection was and he was positive that only such shipments as were used locally, and which passed through the city for distribution by railroads that had no other terminals, were handled at that dock; that for a period all inland shipments were handled over that dock; that he had not handled any large shipments over that dock himself; that by large shipments he meant anything over 40 or 50 tons; that he had no recollection of handling anything in excess of 10 tons over the Harrison Street dock; that the handling of 10 tons of dynamite over that dock was in his experience very infrequent. That he knew that other barges containing dynamite had been handled at buoys in the Seattle Harbor. That in 1915 he handled quite a few shipments for the Hercules Powder Company, but that the most of the shipments handled by him were handled for the Giant Powder Company; that the Giant shipments were not transferred in the harbor of Seattle, but were left at the depot at Possession Point on Whidby Island; that the Hercules Powder Company, so far as he knew, had no depot, and their shipments were transferred in the harbor of Seattle within Elliott Bay.

Whereupon the defendant rested.

Whereupon the plaintiff rested. [73]

Whereupon counsel for defendant renewed the motion made at the conclusion of plaintiff's testimony.

Whereupon argument to the Court was made by counsel for the respective parties. In the course of his closing argument, Mr. Rupp said:

"Now, right along at that same time let us come to this Kitsap County Transportation Company case, concerning which they talked so much.

* * * * *

There was a charge against the city of negligence. Negligence how? In failing to enforce against some third person the provisions of the ordinances of the City of Seattle, but that is not this case. I quite agree that if Lillico, without having been directed so to do, had taken that dynamite down to buoy No. 1 and it had exploded, that we could not maintain a suit against the City of Seattle because it had failed to enforce the ordinances which would have required the storage of that powder at the Harrison Street Dock. I agree to that proposition. We have never asserted anything to the contrary, but we say that that is not this case. The Port Warden says, 'You shall not place it where the law says you shall place it, but I will make a law of my own and I say to you,—I direct you to go somewhere else.' Now, mind you, I am not charging that the Port Warden himself is guilty of any great wrongdoing in this matter. It has nothing to do with the case at all. The City of Seattle knows that this has been going on. They knew that he put it down there. They knew that they had an ordinance requiring it to be

put somewhere else, and it is their act and not his act against which we complain.”

At the conclusion of all argument, the Court said:
[74]

The COURT.—Regarding this claim, I think it is perfectly clear that a corporation can only act by and through an agent and that these Washington decisions, to which my attention has been called, are not concerned with the sufficiency of the agency, but only where an individual had a claim—the necessity of the individual to verify the claim. I hold the claim is sufficient and, without undertaking to trace the source of the city’s power to regulate anchorages and establish buoys, I hold that the establishment of the buoy and the designation of the anchorage and collecting a fee for it all were within the power of the city, and they have so long been exercised and so uniformly in the cities that have harbors that even if I had any serious doubt about it, I would resolve it against the city. It would certainly be more of a calamity to try to establish a precedent in law that the city did not have this power than it would be to hold the city liable in this particular case. I do not see that the Federal Government’s general authority, when it sees fit to exercise its power over Interstate Commerce, is involved in this case where it has not undertaken to do so as regards harbors of this character.

The sole question in the case comes down to—possibly not the sole question, but the most important question in the case comes down to—the question of whether the city, through its harbormaster did

become liable by violating one of its own ordinances.

I had read before this case was tried and argued, the record in this case and the briefs several times and thereby had to some extent familiarized myself with these ordinances. With regard to the purposes of storage, and I hold [75] that this dynamite was in storage, I pause for a moment regarding the several witnesses for defense. The answer of one of them impressed me in just the conclusion that was forcing itself upon me during the progress of the trial, that is, in the absence of the control of the section of the ordinance regarding the powder dock, this might not have been an unsuitable place to effect a transfer of the powder from one vessel to another. Mr. Griffith asked his own witness the leading question, "Do you not conclude that this was a safe and suitable place for the storage of powder and for its transfer?" That is the substance of it. The witness answered, "I consider it suitable for its transfer." And Mr. Griffith was not satisfied with that answer and he said, "And also suitable for its storage?" and the witness hesitated and answered, "Yes." Now, his first answer was the one that impressed me as most reasonable and satisfactory and really the one that his conscience was back of.

This Section 39 of this ordinance I find to be controlling in regulating the storage of dynamite for any such length of time as this was kept in the harbor. These Sections, the first time I read them over, did some what confuse me and that confusion was added to by Mr. Griffith's clever argument that by implication the Charter did authorize the keeping

of dynamite elsewhere. But in reading them over again nearly all of them that he relies upon, instead of referring to dynamite, referred to any explosive, that is, the handling and transferring of any explosive. There are many kinds of explosives besides dynamite and where it requires that the crew shall be kept on board vessels in the harbor at all times where it has any explosives on board, [76] and where it prohibits smoking where there is any explosive being handled and where it requires that explosives shall not be handled by tackle or slid down gang-planks, these do not help us when we come to consider these sections that regulate the handling of dynamite.

Now, there seem to be three of those besides 39—that is, three that I think are particularly applicable. The one that gave me most concern was this one, “No person shall on any pier, or other structure, except on the Powder Dock or on powder boats, within Seattle Harbor, store or have on hand for sale, or sell, or keep any powder, ignition caps, dynamite or other explosive, either by day or night.” Now, construing that section in connection with the others I conclude that it is not applicable here for two reasons: first, that the word “keep,” that follows the word, “sell,” really means as though it read thus, “store or have on hand for sale, or keep for sale any powder, ignition caps or other like explosive.” I also conclude that it is not applicable because of the language proceeding. It says, “No person shall on any pier or other structure, except on the Powder Dock or on powder boats.” Section 39 requiring

powder boats to be kept at the Powder Dock—in order to cover the tow powder boats here mentioned beside the Powder Dock—it would be assumed that the powder boats in case the explosive was dynamite would be at the Powder Dock.

The other one, Mr. Rupp has pointed out wherein it is not applicable—that is, at any other pier in Seattle Harbor between sunset and sunrise. This was kept out there for seventeen days and nights. So it is not applicable. [77]

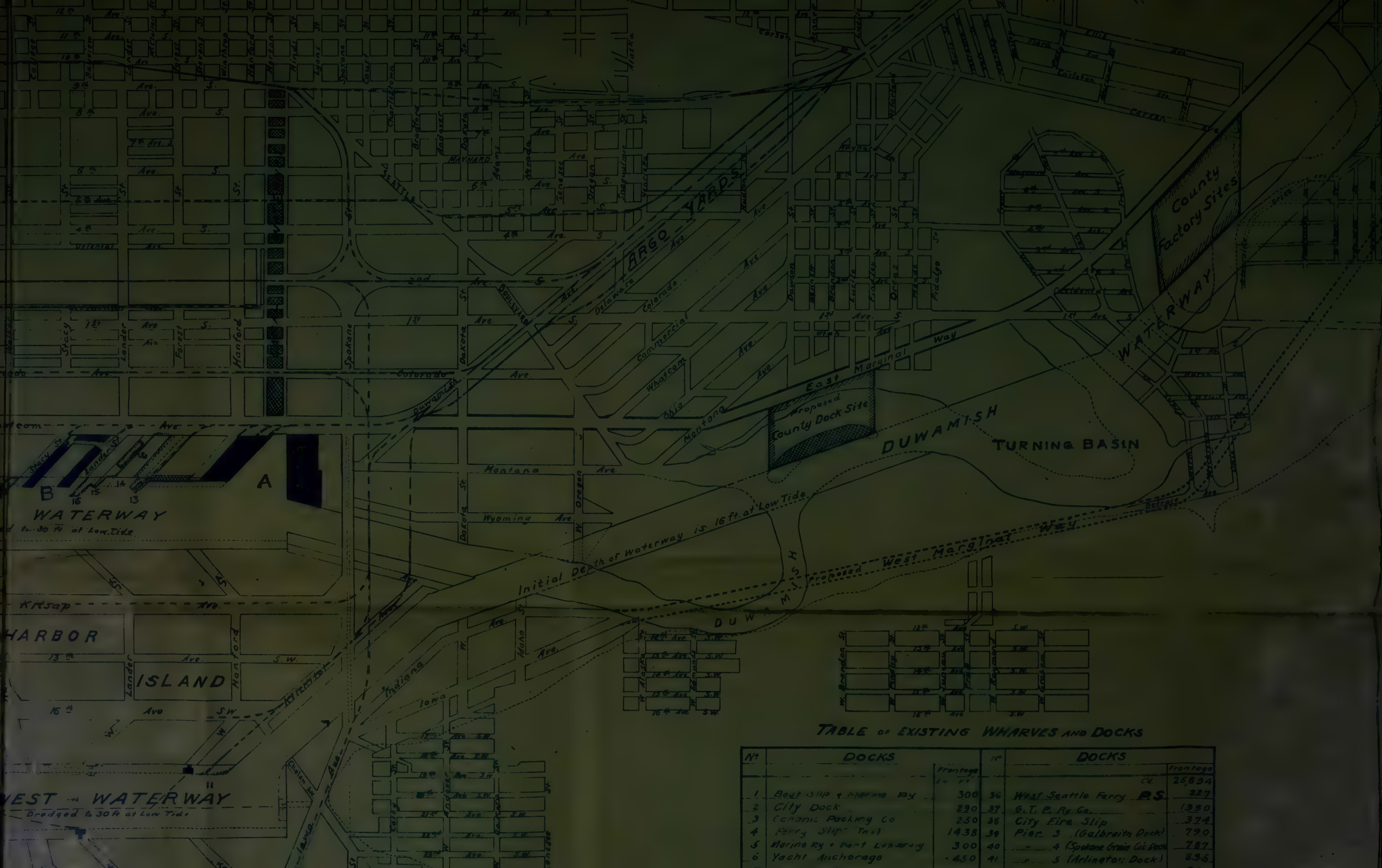
And the argument of Mr. Griffith regarding Section 39, which I will read, is hardly tenable. “The Harrison St. Municipal Pier is hereby designated for use temporarily as a powder dock.” This time it was designated temporarily. There is nothing shown but what that temporary period is still continuing. There has nothing been disclosed to induce the Court to think that it has expired in any way. There is no ordinance regarding it. It says, “And for use exclusively for the handling of powder, dynamite and other like explosives.”

Mr. GRIFFITH.—Handling, and not storing. Just handling.

The COURT.—“Handling and as a place for vessels carrying as cargo, or part cargo, such explosives.” Now, the word “exclusively” there covers both—covers the vessels when they carry such explosive, that is, dynamite. I hold that a nuisance was created and that the city is liable for the damage.

Whereupon counsel for defendant excepted to the above rulings of the Court, and the exception was allowed. [78]

✱ FEDERAL BLDG. (Post Office etc.)



WATERWAY
Dredged to 30 ft. at Low Tide

WATERWAY
Dredged to 30 ft. at Low Tide

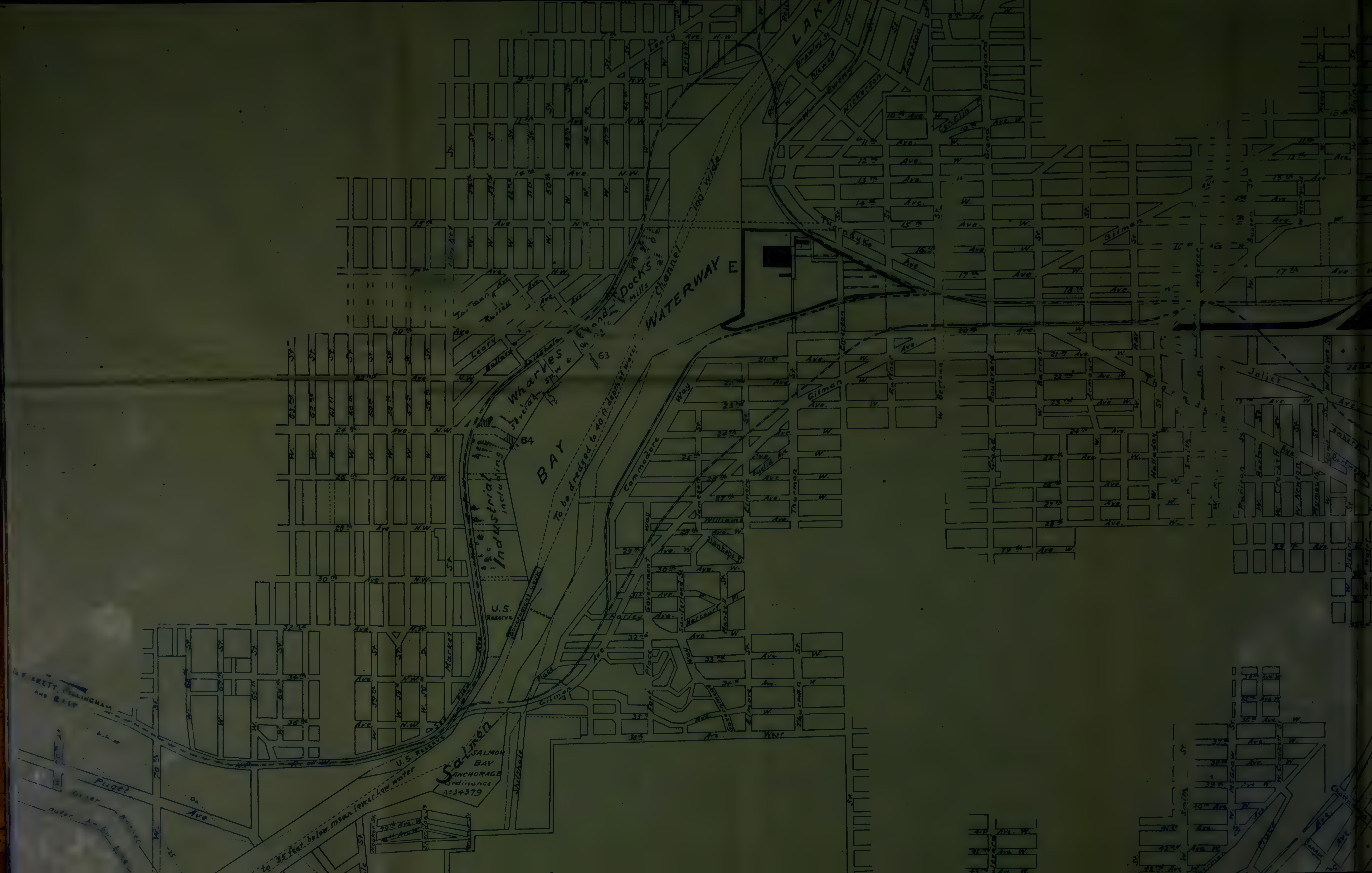
WEST WATERWAY
Dredged to 30 ft. at Low Tide

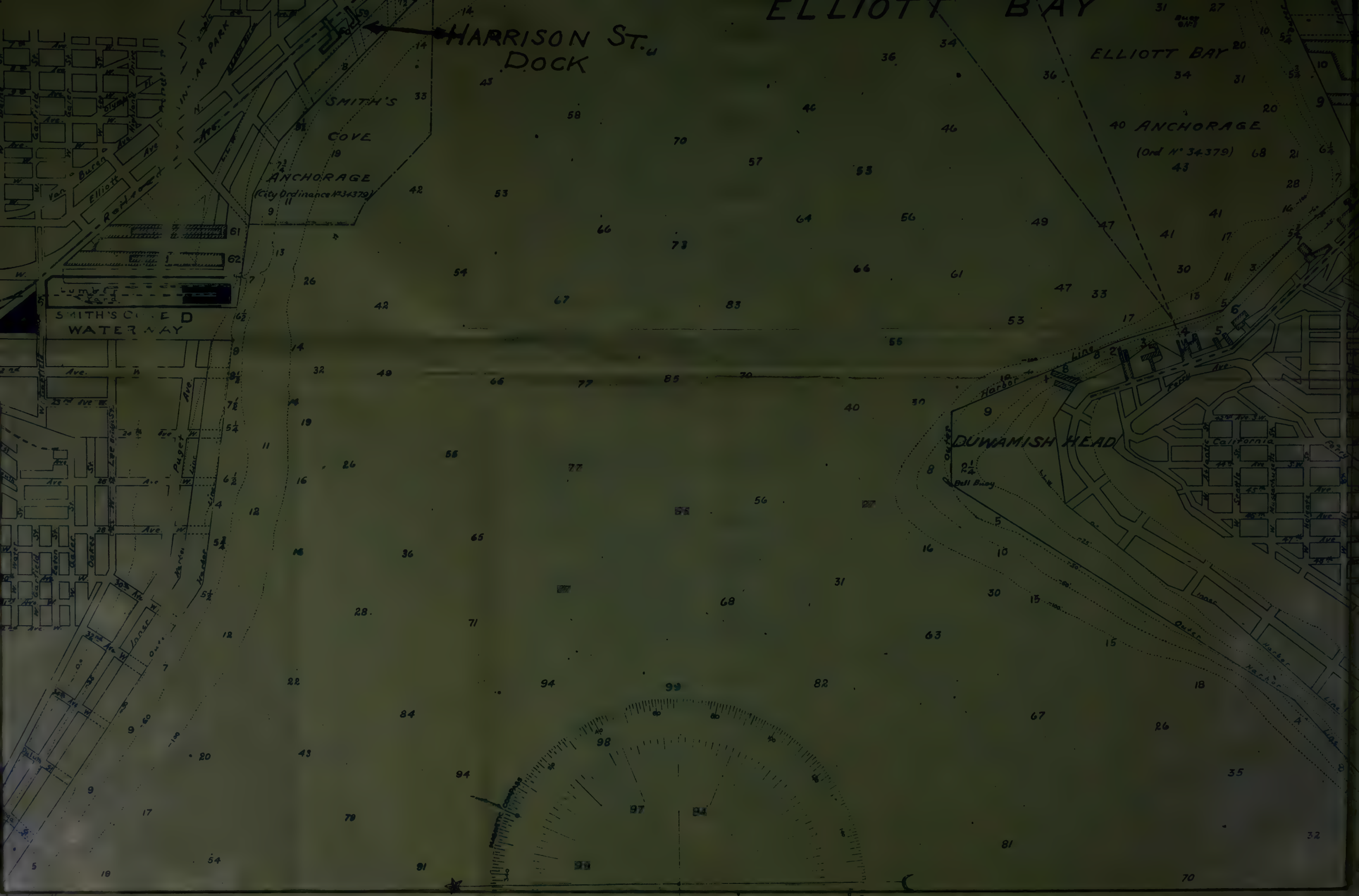
Proposed County Dock Site

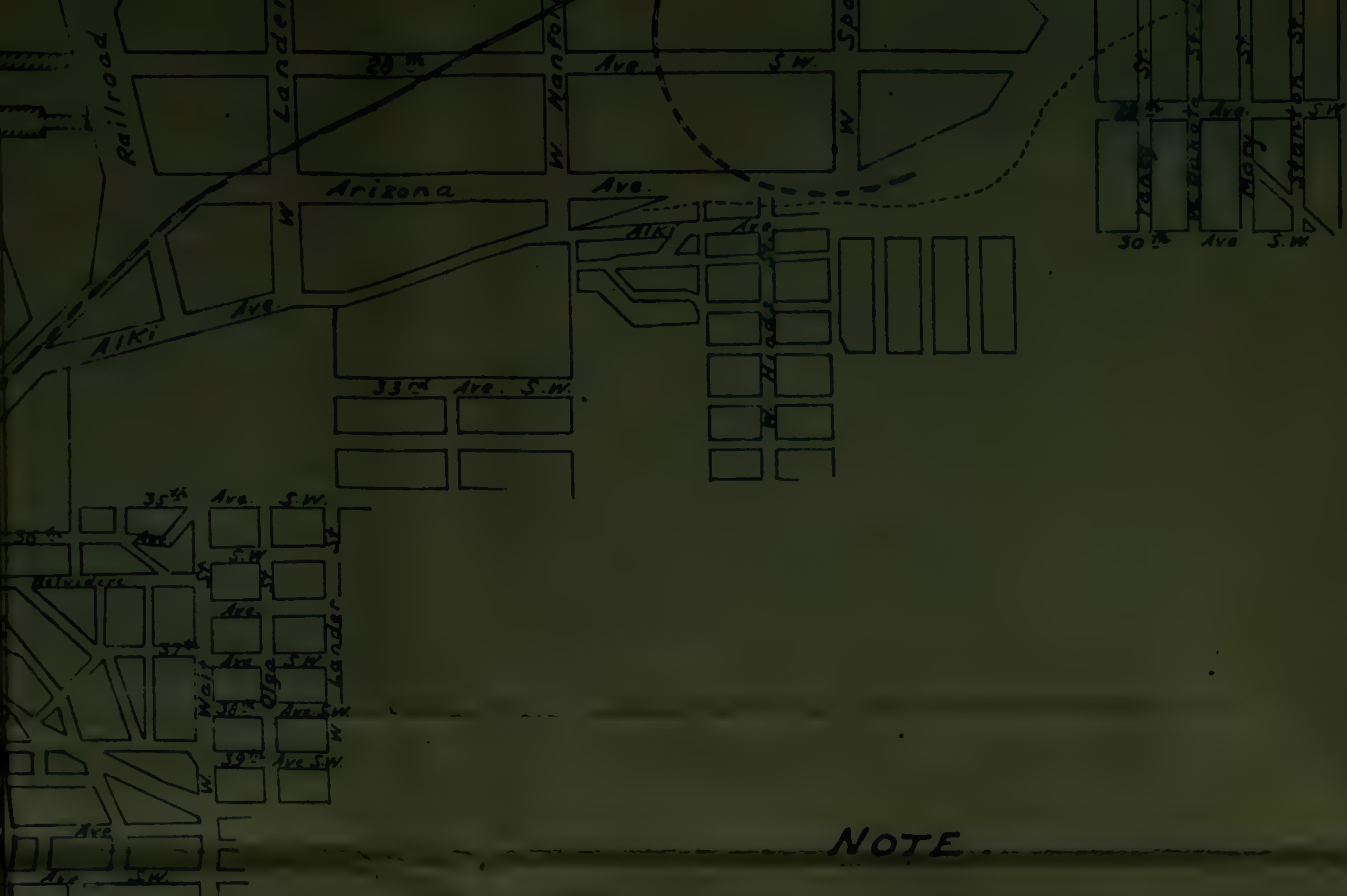
County Factory Sites

TABLE OF EXISTING WHARVES AND DOCKS

No	DOCKS	Frontage in ft.	No	DOCKS	Frontage in ft.
1	Boat Slip & Wharve Ry	300	36	West Seattle Ferry	227
2	City Dock	290	37	G. T. P. Ry. Co.	1390
3	Cosmetic Packing Co	250	38	City Fire Slip	374
4	Ferry Slip (Tid)	1438	39	Pier 3 (Galbreith Dock)	790
5	Marine Ry & Boat Landing	300	40	4 Spokane Grain Co Dock	787
6	Yacht Anchorage	450	41	5 (Arlington Dock)	835







WEST

SEATTLE

NOTE

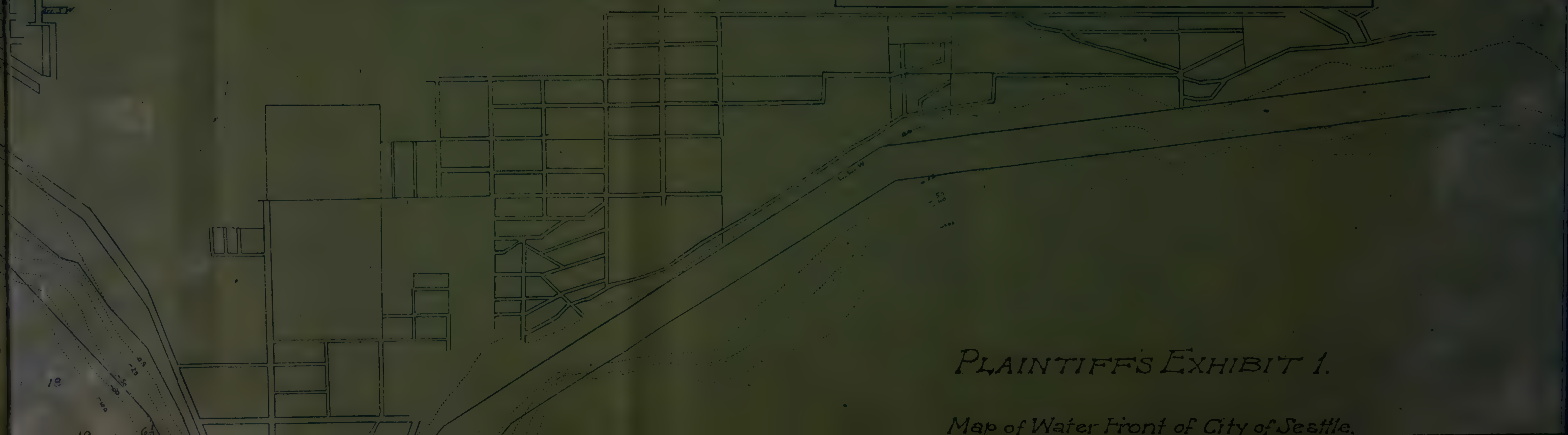
At the piers and wharves about Elliott Bay there is from 25 to 50 feet of water at low tide, the average at piers utilized by deep sea vessels is about 40 feet.

The East and West Waterway channels are dredged to 30 feet at low tide.

At the proposed Port of Seattle docks the depths will vary between 30 and 40 feet according to the uses to which the improvements are put.

12	W.B. Perry Ship (C.M. & P. Ry.)	200	47	Piers 9 & 10	283	
13	C.M. & P. Ry. (Sound & Coast Dock)	800	48	" " (Oriental Dock)	711	
14	Wieding Fish Co.	210	49	Seattle Dock	1000	
15	Commercial Boiler Works	785	50	Gallbraith Beacon & Co. Wharf & Dock	1055	
16	San Juan Fish Co.	645	51	Richmond Beach Sand & Gravel Co.	53	
17	Standard Oil Co.	750	52	Chlopeck Fish Co.	443	
18	Hammond Milling Co.	559	53	Pacific Coast Co.	431	
19	Albers Bros.	497	54	Roslyn Coal Bunkers (N.R.R.)	688	
20	Interstate Fisheries Co.	190	55	Pier 14 (Ainsworth & Dunn)	1330	
21	Centennial Milling Co.	620	56	Union Oil Co.	1027	
22	Seattle Const. & Dry Dock Co. (C.P.T.)	12000	57	Martin Gravel Co.	75	
23	Moran Mill Dock	166	58	Colman Greasing Works	1346	
24	Moran Ship Building Co.	1300	59	City Dock	400	
25	C. & P. S. Ry. Co.	750	60	Seattle Lumber Co.	820	
26	P.C. Coal Docks (2) & Bunkers	1885	61	G.N. Ry. Dock	1590	
27	Chesley Dock	635	62	G.N. Ry. Elevator & Dock	1330	
28	Pier D (P.C. S.S. Co.)	1356	63	City Dock at 20th Ave. N. (Ballard)	483	
29	" " C	805	64	" " " 24th " " "	450	
30	" " B { C.P. Ry. Docks	924	Total Dock Frontage			47514
31	" " A {	886	NOTE:-			
32	" " 1 {	1820	Total Available Dock Frontage classified			
33	" " 2 { N.P. Ry. Docks	1675	somewhat arbitrarily approximately as follows:			
34	Colman Dock	1440	Deep Sea			9783
35	Forward	25,894	Coastwise & Local			30,646
			Industrial			7085
			Total dock frontage			47,514

PORT OF SEATTLE DOCKS		Frontage Linear Feet
A	EAST WATERWAY TERMINALS	3020
B	EAST WATERWAY	2600
C	CENTRAL WATERFRONT	1780
D	SMITH'S COVE WATERWAY	3700
E	SALMON BAY WATERWAY	1700
Total Dock Frontage		12800
Classification of the New Dock Frontage	Deep Sea	9440
	Coastwise & Local	2420
	Motor Boats, etc.	940
Total (as above)		12800



PLAINTIFFS EXHIBIT 1.

Map of Water Front of City of Seattle.

PUGET

S O U N D

West Boundary of FAIRWAY (City Ordinance No 34379)

Map of Water Front of City of Seattle.

PORT OF SEATTLE

General Map

Seattle Harbor

Showing Docks and
Railway Connections

May 1915

J. R. WEST
Chief Engineer

Scale $\frac{1}{12,000}$



ALKI POINT

* ALKI POINT
LIGHT HOUSE

Legend

Port of Seattle Improvements shown thus



Unimproved Public Property shown thus



Railroad Property



SOUNDINGS IN FATHOMS

In the Harbor the soundings show the depth
at 2 feet below mean lower low water.
In Lake Union the plane of reference is 2 feet
below high water mark of that lake, or about
23 feet above the Harbor plane.



**Exhibit "B"—Claim of Lloyds Plate Glass
Insurance Co.**

**BEFORE THE COUNCIL OF THE CITY OF
SEATTLE.**

In the Matter of the Claim of LLOYDS PLATE
GLASS INS. CO., for Damages.

To the Honorable City Council of the City of Seattle,
Washington:

COMES now Lloyds Plate Glass Insurance Com-
pany and makes and files its claim for damages as
follows:

I.

That claimant is now and was at all times herein-
after mentioned and for more than one year last past
has been a corporation organized and existing under
the laws of the State of New York, with its residence
and principal place of business at 63 William Street
in the City of New York in said State, and qualified
licensed and authorized to do business as an insur-
ance company in the State of Washington, having
complied with all the laws thereof relating to foreign
insurance companies carrying on business in said
state, and having duly designated, appointed and
maintained during all of said time an agent resident
in the City of Seattle, County of King, in said State.

II.

That prior to May 30, 1915, each of the persons,
firms and corporations named in the schedule hereto
attached, marked Exhibit "A" and hereby made a
part of this statement, being [80] then the own-
ers respectively of the glass windows, doors or tran-

soms located in the City of Seattle at the places in said exhibit designated by street numbers after the names of such persons, obtained from the claimant, in consideration of the payment of its established premiums, claimant's policy of insurance insuring said owner against loss by breakage of said glass in a sum equal to the amount set forth after each of said names, and said policies were in full force and effect upon May 30, 1915.

III.

That for a long time prior to May 30, 1915, and up to and including said date, the harbormaster, port warden, Chief of Fire Department and fire marshall of the City of Seattle, each and all negligently and carelessly directed, suffered and permitted to be and remain within the corporate limits of the City of Seattle, to wit, at a buoy owned and maintained by said City and located in the Harbor of Seattle, near the north end of Harbor Island therein, and without proper guard or protection, a certain scow loaded with about fifteen (15) tons of dynamite or other highly explosive substance, the exact name or nature of which is unknown to claimant, but the dangerous nature of which was well known to said officers and each of them.

IV.

That the names of the owner or owners of said scow or of said explosive are unknown to claimant, but claimant is informed and believes that said explosive was shipped by the Hercules Powder Company, from San Francisco, California, upon the steamer "F. S. Loop," consigned to Baldwin Ship-

ping Company or Foerstner Hoettar Company at Vladivostok, Asiatic [81] Province of Russia, in care of J. T. Steeb & Co., of Tacoma, Washington, unloaded and transferred to said scow at Seattle for reshipment.

V.

That said scow so laden was permitted to be moored at said buoy by the direction and with the consent of said officers of the City of Seattle, in consideration of revenue derived or to be derived by said City in the way of fees and otherwise.

VI.

That on the 30th day of May, 1915, the said dynamite or other substance, by reason of some cause or causes to claimant unknown, exploded with such violence as to break the glass described in the attached Exhibit, and the same was thereby broken and lost, and the claimant was thereby rendered liable upon its said several policies of insurance in the amounts and to the persons set forth in said schedule.

VII.

That said loss and damage was not brought about by reason of any peril or cause excepted by said policies of insurance, and as required and provided by its said policies, the claimant has discharged its said liability by the payment of the value of the glass so broken and the cost of removing and replacing same, less salvage, or by replacing the same; and each of the said policy holders has heretofore by written instrument duly executed and delivered, sold, assigned and set over unto claimant all his right, title and interest in and to the claim or cause

of action against said City of Seattle in anywise arising or growing out of said explosion and the loss and damage thereby sustained, and thereby and by the provision of said policies, the claimant has been subrogated [82] to the rights and claims of its said policy holders and each of them in the premises.

VIII.

That by reason of the negligence and want of care of the said City of Seattle, and its said officers, agents and servants as aforesaid, this claimant has been damaged in the total of the sums which it has paid in accordance with the terms of its said policies as set forth in said Exhibit "A," to wit, in the sum of \$5,749.43.

WHEREFORE, claimant prays that its said claim be audited and allowed by your honorable body and ordered paid out of the funds of said City of Seattle.

LLOYDS PLATE GLASS INSURANCE
COMPANY,

By BOGLE, GRAVES, MERRITT &
BOGLE,

Its Attorneys,

609-616 Central Building, Seattle. [83]

State of Washington,

County of King,—ss.

Lee D. Gilmer, being duly sworn on his oath, deposes and says: That the above-named claimant, Lloyds Plate Glass Insurance Company is a corporation organized under the laws of the State of New York and has no officer within the State of Washington: That Shay Bros. and Gilmer is a corporation

organized and existing under the laws of the State of Washington and affiant is an officer thereof, to wit, its treasurer and secretary. That the said Shay Bros. and Gilmer, a corporation is the duly appointed, qualified and acting agent of the said Lloyds Plate Glass Insurance Company in the State of Washington and is authorized to verify the foregoing statement of claim upon behalf of said claimant. Affiant has read the foregoing statement, including the exhibit therein referred to and thereto attached, knows the contents thereof and the same is true as he verily believes. That all the material facts therein set forth are within the personal knowledge of affiant and he makes this affidavit as the act of Shay Bros. and Gilmer upon behalf of said claimant and for the reasons above set out.

LEE D. GILMER.

Subscribed and sworn to before me this 29th day of June, 1915.

[Seal]

CARROLL A. GORDON,

Notary Public in and for the State of Washington,
Residing at Seattle. [84]

J. M. Colman Co.	S. E. Corner 1st Ave.	Upper front	\$185.00
	So. & Yesler Way		
	N. E. Corner Marion		
	and 4th Ave.	1 plate door.....	8.65
Standard Furniture Co.	N. W. corner Second Ave. and Pine St.	6 windows on street floor 1 on mezzanine floor	323.20
Bon Marche	S. W. Cor. Second Ave. & Pike St.	1 return window, 1 front window base-ment entrance	27.90
Thos. M. Green	Stadaker Bldg., 5th Ave. between Pike and Union.	1 front and 1 return window	76.20
Butler Hotel Com-pany	N. W. Corner Second & James.	1 front window.....	49.50
H. N. Richmond	Virginia Hotel 4th & Cherry	1 front window.....	24.50
Albert Hansen	1919 Second Ave.	2 front, 1 return win-dows	98.30
Herman & Blumen-thal	120 Second Ave. So.	1 lower front, 1 re-turn	69.76
J. & F. McDermott (Bon Marche)	N. W. Cor. 2nd & James.	6 front windows mez-zanine floor	281.75
Shafer Bros.	92 Yesler Way	2 front and 2 return windows	89.60
Hotel Savoy Co.	1212-16 2nd Ave.	Art Glass	10.00
Men's Bootery	915 Second Ave.	Upper front window..	8.70
		Sign	6.00
Amos Brown Es-tate	613-621 Third Ave. 1100 1st Ave. 2nd & Seneca, 1111 2nd Ave.	Return window	18.50
		Front window.....	27.02
		2 front windows.....	93.40
		5 front windows.....	262.70
[85]			
Alhambra Bldg. Co.	S. E. Cor. Westlake & Pine.	1 return window.....	69.90
		1 front window.....	15.25
J. B. & J. F. O'Shea	511 Pine St.	3 return windows and 3 front windows...	325.42
C. D. Mason	651 and 661 King St.	3 front windows.....	101.60

Kinnear & Brawley	619 Second Ave. So.	2 return and 2 front windows209.70
G. Kinnear Co.	210 Occidental Ave.	1 front window 11.15
S. Hyde	115 James St.	3 front windows.....146.20
Mission Liquor Co.	1322 Second Ave.	2 upper fronts..... 54.10
F. L. Heidrick & Co.	8th Ave. So. & Adams	2 front windows..... 63.00
Cowley Investment Co.	5th & Aloha	1 front window..... 22.33
G. Kinnear Co.	401 Pike St.	2 return windows.... 32.40
	403 Pike St.	1 front, 1 return win- dow, 1 transom.... 46.39
May Thagard	3rd & Union	1 front window..... 19.85
Outlet Clothing Co.	Occidental & Wash- ington Street.	2 windows 95.90
Gatzert-Schwabach- er Land Co.	1513-19 5th Avenue.	3 windows 84.00
Gatzert-Schwabach- er Land Co.	Occidental Ave. & Main Street.	3 windows 48.50
Eva M. Aronson & Augusta M. Pres- ton	1119-1123 1st Ave.	3 windows 41.19
Stengen & Ursdit- sky	82 West Main St.	2 windows 9.23
Crawford & Wag- ner	402 Pine St.	1 window 3.75
Shibata Co.	524 Main St.	2 windows 34.63
Ida McDermid	20th Ave & Jackson St. S. W. Cor.	1 window 29.44
Ale Meister	2203 1st Ave.	1 window 13.52
Thomas Burke	216-218 Union St.	3 windows 56.85
Spelger & Hurlbut	2nd Ave. & Union St.	2 windows 59.30
Douglas & Berg	15th Ave & Madison	1 window 19.90
[86]		
Hans Graf	539 Queen Anne Ave.	1 window 8.40
Hans Graf	537 Queen Anne Ave.	1 window 22.18
Thomas Burke	2nd Ave. & Marion	1 window 51.10
Cascade Gas & Elec- tric Fix. Co.	1517-19 Second Ave.	6 windows173.10
W. H. Maud	1900-10 First Ave. 106-8 Stewart St.	2 windows 38.50
Thomas Burke	912-16 Second Ave.	5 windows162.91
Thomas Burke	2nd Ave. & Marion St.	1 window 16.70

Western Dry Goods	1st & King N/W Cor.	2 windows	19.28
Western Dry Goods	1st & King N/W Cor.	24 windows	620.75
Veith-Cammaek	2nd Ave. & James	2 windows	108.64
R. Sartori	312 2nd Ave. So.	9 windows	187.30
Oriental Amer. Bk.	6th & Main	3 windows	55.61
Crescent Mfg. Co.		3 windows	75.25
Muhl Store	616 Pike St.	1 window	25.01
Contractors Equip- ment Co.	522 1st Ave. So.	6 windows	116.55
Stone Brothers	Central Bldg. 3rd Ave.	4 windows	184.80
Business Property	& Marion St.	11 windows	463.85
Security Co.	Central Building.	4 windows	108.80
Business Property	Ry. Exchange Bldg.		
Security Co.			

[87]

Exhibit "C"—Notice of Claim and Itemized Account.

To the City Council of the City of Seattle, a Municipal Corporation:

YOU ARE HEREBY NOTIFIED that as the result of an explosion of about fifteen tons of dynamite placed on a scow which was negligently permitted by said City of Seattle to be moored to a buoy at the north end of Harbor Island in the harbor at Seattle, Washington, and without proper guard or protection, the following described property, to wit: 1612-1614 and 1616 3d Ave., Seattle, Wash., was damaged on the morning of May 30, 1915, in a total sum of \$119.84; such damage consisting of breaking of glass windows and the expense of repairing such breakage and removing the broken glass, less salvage thereon. An itemized statement of the items making up said sum is hereto attached and made a part hereof.

The windows located as above described and broken by said explosion were insured by the under-

signed by Policy No. 334363, dated Dec. 11, 1914, and said policy was on said 30th day of May, 1915, in full force and effect.

That under and by the terms of said policy the undersigned was required to replace said windows or pay the value thereof, plus cost of replacement, to the insured; that the undersigned replaced said windows at the total cost of \$119.84, and that under and by the terms of said policy the undersigned is subrogated to the claim of the insured in said amount of \$119.84.

The undersigned now is and for more than one year last past has been a corporation organized and existing under and by virtue of the laws of the State of New York, with its principal place of business at No. 45 William Street [88] in New York City, N. Y.

[Seal] GLOBE INDEMNITY COMPANY.

By JOHN DAVIS & COMPANY,

Its General Agent.

By VINCENT D. MILLER,

Its Secretary.

State of Washington,

County of King,—ss.

Vincent D. Miller, being first duly sworn, on oath deposes and says: That he is secretary of John Davis & Company, a corporation, the general agent of the above-named claimant, and makes this verification on its behalf; that the above claim and the itemized account attached thereto and made a part thereof are true and correct.

VINCENT D. MILLER.

Subscribed and sworn to before me this 29th day of June, 1915.

[Seal]

JOHN P. GARVIN,
Notary Public in and for the State of Washington,
Residing at Seattle. [89]

C. C. BELKNAP GLASS COMPANY.

Sold to John Davis & Co.

Address, 807 2nd Ave., City.

Your Order No. ———. Our No. 4749.

Seattle, Wash. 6/6/15.

1—Plate 88 x105.....	\$331.00			
1—Plate 85 x120	366.00			
1—Plate 63 x 80½	183.00			
1—Plate 80½x102	297.00	\$1177.00	90-5%	\$111.82
	Setting			11.00
				<hr/>
				\$122.82
Salvage—1—21x87.....				2.98
				<hr/>
				\$119.84

Set at 1612-14-16—3rd Ave.

[90]

(Back)

File No. 60987.

Claims of Globe Indemnity Co. Account Explosion.

Filed Jun. 29, 1915.

H. W. CARROLL,
City Comptroller and Ex-officio City Clerk.
By E. M. STREET,
Deputy.

ACTION OF THE COUNCIL.

Referred to Finance Jul. 6, 1915.

Jul. 26, 1915. Rejected.

Report of Committee.

Mr. President:

Your Finance Committee to which was referred

the within Claim would respectfully report that we have considered the same and respectfully recommend that it be rejected.

HAAS,
Chairman. [91]

Exhibit "D"—Policy of Insurance, December 1, 1914, Globe Indemnity Co. of New York to Lennon's, a Corporation.

GLOBE INDEMNITY COMPANY OF NEW YORK (herein called the Company) in consideration of the premium hereinafter provided,

DOES HEREBY AGREE

To indemnify the Assured against the breakage of any glass described in the schedule herein, which may occur during the term of this policy as defined herein.

The foregoing Agreement is made subject to the following conditions:

1. In the event of breakage of any of the glass mentioned in the schedule immediate notice thereof must be given to the Company with full particulars. The word "breakage" shall not include any defacement or damage other than a fracture extending through the entire thickness of the glass.

2. The Company at its option may replace any broken glass, or pay in cash the amount for which such broken glass is insured hereunder. If no such amount is specified in the schedule, then the actual market value at the time of breakage shall be deemed the amount insured. In either case, the broken glass shall belong to the Company.

3. Whenever necessary the Assured shall, at his expense, remove and replace any frames, fixtures, woodwork, or other obstructions to the replacing of the glass.

4. The Company shall be subrogated to all rights which the Assured may have against any person, partnership corporation or estate as respects any payment made under this policy, and the Assured shall execute all papers required to secure to the Company such rights.

5. The Company shall not be liable for—(1) any breakage resulting directly or indirectly from fire, earthquake, inundation, insurrection, riot, or any military or usurped power; [92] (2) any breakage resulting directly or indirectly from the blowing up of buildings when authorized by Civil Authorities; (3) any breakage or damage to any ornamentation on the glass, unless same is specifically described in the schedule of this policy, and then only when said breakage or damage is caused by the breakage of the glass on which it appears; (4) any breakage caused by the acts or operations of workmen engaged in making repairs, alterations or additions in or to the building or frames in which the glass is located; (5) any breakage of the glass while being glazed or before such glazing is completed in a workmanlike manner; (6) any breakage caused by the removal of any light of glass from its frame; (7) any loss or damage to the frames or sashes, or other than that of the glass.

6. This policy may be cancelled by the Company at any time by five days' written notice mailed to

the Assured at the address herein given as the location of premises, and the Assured shall be entitled to receive the unearned premium computed *pro rata*. This policy may also be cancelled by the Assured at any time by like notice in writing to the Company, and in such case the Company shall be entitled to the earned premium calculated on the basis of the short rate table printed hereon. The check of the Company or of its authorized representative for the return premium mailed to the Assured at the address herein given shall be a sufficient tender of payment thereof.

7. No change in the agreements, provisions or statements in the policy either printed or written, shall be valid unless made by endorsement signed by the President or the Secretary of the Company, nor shall notice to, or knowledge possessed by any representative or any other person be held [93] to waive, alter or extend any such agreements or conditions.

8. No assignment of interest under this policy shall bind the Company unless such assignment is consented to by endorsement signed by the President or the Secretary of the Company.

9. No person shall be considered a representative of the Company unless such person is authorized in writing as such representative by the President or the Secretary of the Company.

10. No action for the indemnity against loss provided for in this policy shall lie against the Company unless brought within twelve months after the right of action accrues, but if this condition is at variance

with any specific statutory provision of the State in which the accident occurs such specific statutory provision shall be substituted for this condition.

11. If insurance against breakage of any glass covered by this policy is carried in any other company the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid insurance.

STATEMENTS.

1. The name of the Assured is Lennon's, a corporation.

2. The Premium for this Policy is Twenty-eight and no/100 Dollars \$28.00 and its term 12 months from twelve o'clock noon of the 1st day of December, 1914, to twelve o'clock noon of the 1st day of December, 1915, standard time at the place where this policy is countersigned.

3. Location of Premises No. 1106, Second Avenue, City of Seattle, State of Washington. [94]

4. Occupied for mercantile purposes.

5. The schedule of glass insured is as follows:

#1106 Second Avenue.

2 90 x 112 Arcade Returns (25% off list price)	8.23
2 46 x 90 Fronts	3.06
2 90 x 114 Returns	11.20
2 46 x 90 Fronts, back	3.06
2 18 x 90 Returns	1.20
1 32 x 64 Door76
1 18 x 36 Transom over door11

2	34 x 60	Sliding Doors, back window (not wired)	1.50
2	18 x 54	Mirrors on window post inside...	.50
1	46 x 90	Front	1.53
2	54 x 90	Sides	3.60
2	16 x 60	Doors50
1	20 x 36	Transom12
1	22 x 96	Top inside show case.....	1.17
1	32 x 96	Side front inside show case.....	1.71
2	20 x 32	Ends front inside show case.....	.30
2	12 x 46	Shelves inside show case.....	.27
2	14 x 46	Shelves inside show case.....	.33
4	20 x 28	Mirrors inside show case.....	.54
1	22 x 32	Mirrors inside (South wall front)	.11
2	16 x 30	Signs, Value \$15.00 each (chipped-gilded)	2.25
1	16 x 108	Signs, Value \$30.00.....	2.25
1	28 x 28	Signs, Value \$50.00 Chipped-gilded outside	3.75
5		Signs, Value \$12.00 each.....	9.00
			<hr/>
			\$57.05
Less discount			29.05
			<hr/>
			\$28.00

This slip is attached to and forms a part of policy No. G 334362, issued by the Globe Indemnity Co. to Lennon's A Corporation.

Dated December 1st, 1914.

(Signed) JOHN DAVIS & CO., INS. DEPT.,
 Agents.
 L. V. BREWER,
 Manager.

In witness whereof the Globe Indemnity Company of New York has caused this policy to be signed by its President and its Secretary, but the same shall not be binding upon the Company until countersigned by a duly authorized representative of the Company.

HENRY W. EATON,
President.

A. DUNCAN REID,
Secretary.

Countersigned at Seattle, Wash., this 1st day of December, 1914.

JOHN DAVIS & CO., INS. DEPT.,
Authorized Representative.

L. V. BREWER,
Manager. [95]

(On back of Policy appears the following:)

Globe Indemnity Company
of New York.

Glass Policy

G334362

Issued to

Lennon's a Corporation

1106 Second Ave.

Please Read This Policy.

In Case of Loss, Notify Agent
or Company Immediately.

John Davis & Co. Agents
Seattle, Wash.

Globe Indemnity Company.

Home Office:

45 William Street,
New York City. [96]

**Exhibit "E"—Statement of Policies of Insurance,
etc.**

Policy No.	Assured.	Location.	Date of Issue.	Amount of Claim.
334363	Frank McDermott	1625-27—4th	12-11-14	100.22
334391	Isaac Cooper	224 Pike	3-10-15	22.71
334326	Edgar G. Ames	S. W. Cor. 2nd & Stewart.	8-11-14	236.67
334362	Lennons, Inc.	1106—2nd Ave.	12-1-14	53.65
334368	Struve Estate	1014—1st Ave.	1-2-15	216.92
330453	University St. Imp. Co.	1216-22—3rd Ave.	6-1-15	310.11
334383	Franklin E. Robinson	S. E. Cor. 1st & Battery	4-8-15	117.95
334341	George W. Stetson	216—2nd Ave. South	10-15-14	8.31
334342	O. F. Finch	1218 Howell St.	10-29-14	17.72
334346	F. K. Struve & John Davis	321 Pine Street	10-14-14	18.29
334372	Est. Chas. McDonald	807 2nd Avenue	2-24-15	15.80
334377	M. Prager & Co.	1207—2nd Avenue	3-22-15	25.43
334376	Aubrey Levy	1401 E Madison St.	3-21-15	9.46
334382	Hardman Estate	S. E. Cor. 7th & Union	4-1-15	6.45
334365	Miller Inv. Co.			
334361	J. Friedman & Son	1010—1st Ave.	1-7-15	15.13
		903—1st Avenue	12-29-14	87.45
334379	John C. Goodrich	109 Prefontaine Pl.	3-17-15	51.72
334360	M. G. Jeffries	1913-17—1st Ave.	12-16-14	59.91
330468	D. Aronson	906 2nd Ave.	8-1-14	36.17
334402	C. Malmö	716 Dearborn St.	5-5-15	30.13
334330	Gordon Voorhies	2119-23 2nd Ave.	9-15-14	29.24
334327	Joseph Hoeslich	1706-10 Yesler Way	9-16-14	46.38
334400	E. F. Sweeney	904 Second Avenue	5-7-15	54.14
330451	J. W. Fales Paper Co.	1018—4th Ave. So.	6-19-14	41.85
330452	Amherst Inv. Co.	1610—2nd Avenue	6-30-14	18.43
334340	F. Stein	4754 California Ave.	10-3-14	12.36
334381	Stander Inv. Co.	1020-22—1st Ave.	4-8-15	105.98
	A. G. Spaulding & Bros.	711—2nd Avenue	8-1-14	56.97
334363	Frank McDermott	1612-14-16 3rd Ave.	12-11-14	119.84
334373	Mer. & Urban Inv. Co.	708-16—1st Ave.	2-4-15	353.92
334369	J. H. Noney	1512—1st Avenue	12-28-14	52.65
334344	Wa Chong Co. Inc.	506-10 Maynard Ave.	10-17-14	74.92

\$2406.88

Order Settling Bill of Exceptions.

BE IT REMEMBERED that on this day, the time fixed for the settlement of the bill of exceptions in the above-entitled cause, the plaintiff appearing by Hughes, McMicken, Ramsey & Rupp; Bogle Graves, Merritt & Bogle; Flick & Paul, the defendant appearing by Hugh M. Caldwell, Corporation Counsel, and Frank S. Griffith, his assistant, and it appearing to the Court that said bill of exceptions contains the ruling made by the Court during the course of the trial, duly excepted to, and exceptions allowed by the Court, together with so much of the testimony and exhibits as tends to explain the objections and exceptions, that this bill of exceptions was seasonably drawn and tendered in due time by the defendant, the City of Seattle, is in legal form, and is conformable to the truth; therefore the above and foregoing bill of exceptions is by me hereby settled, and in authentication thereof is by me signed in open court this 10th day of January, 1918.

E. E. CUSHMAN,
Judge.

Service of the within Bill of Exceptions by delivery of a copy to the undersigned is hereby acknowledged this 10th day of January, 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,
Of Attorneys for Plaintiff.

[Endorsed]: Bill of Exceptions. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy. [98]

*In the District Court of the United States for the
Western District of Washington, Northern Di-
vision.*

No. 3561.—AT LAW.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Assignment of Errors.

Comes now the City of Seattle, plaintiff in error in the above-numbered and entitled cause, and in connection with its petition for a writ of error in this cause, assigns the following errors, which plaintiff in error avers occurred on the trial thereof, and on which it relies to reverse the judgment entered herein, as appears of record.

I.

The Court committed error in admitting Plaintiff's Exhibit 3, being a certified copy of the claim of the Lloyd's Plate Glass Insurance Company, claimed to have been filed with the City of Seattle, as a prerequisite to the commencement of this action.

II.

The Court committed error in admitting in evidence the claim of the Globe Indemnity Insurance Company claimed to have been filed with the City of

Seattle, as a prerequisite to the commencement of this action.

III.

The Court committed error in holding the claim filed by the plaintiff, Lloyd's Plate Glass Insurance Company, sufficient in law.

IV.

The Court committed error in holding the claim filed by the Globe Indemnity Insurance Company and assigned to plaintiff as sufficient in law. [99]

V.

The Court committed error in denying defendant's motion for nonsuit urged before the Court at the close of plaintiff's testimony that the evidence of the plaintiff was insufficient to justify any recovery.

VI.

The Court committed error in holding, as a matter of law, that the city had a right to establish buoys in Seattle Harbor.

VII.

The Court committed error in holding that the nitro-glycerine gelatin content shipped coastwise from San Francisco, destination, port of Vladivostok, Asiatic Russia, and awaiting transfer at Seattle, was in storage by the City of Seattle.

VIII.

The Court committed error in holding that Section 39 of Ordinance No. 34,379 of the City of Seattle was controlling in regulating the transfer or transshipment of dynamite destined for transshipment foreign.

IX.

The Court committed error in holding that because the word "dynamite" was not used in Section 38 of Ordinance No. 34,379 or in any of its subdivisions, it made them inapplicable, notwithstanding the words "any explosive," and "every vessel carrying a cargo of explosives in any form, while lying at anchor or at a city buoy, or alongside the powder dock," were used in said Section 38.

X.

The Court committed error in holding as a matter of law that Section 39 of Ordinance No. 34,379 of the City of Seattle prohibited the transfer of dynamite, or the anchorage of ships [100] carrying dynamite, at any other place than the powder dock, notwithstanding section 38 of said ordinance provided that every vessel carrying a cargo of explosives in any form may lie at anchor in the harbor or at a buoy or at the powder dock.

XI.

The Court committed error in holding that the act of the port warden was in violation of the fire ordinance No. 29,324 and thereby the permitting the anchorage of a vessel loaded with dynamite at a buoy in Seattle Harbor created a nuisance.

XII.

The Court committed error in holding that anchoring a scow loaded with dynamite, an article of commerce, at buoy No. 1 in Seattle Harbor created a nuisance.

XIII.

The Court committed error in determining that

the City of Seattle was liable for the results of an explosion of dynamite on a scow anchored to a buoy in Seattle Harbor over which it had no control, the cause of the explosion not being charged to the city.

XIV.

The Court committed error in refusing to dismiss this action on the motion of the defendant at the close of all the testimony.

XV.

The Court committed error in overruling the defendant's demurrer to the amended complaint of the plaintiff.

WHEREFORE, plaintiff in error prays that the judgment of said Court be reversed, and that the United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right and according to the laws and customs of the United States should be done.

HUGH M. CALDWELL,

Corporation Counsel.

FRANK S. GRIFFITH,

Assistant Attorneys for Plaintiff in Error. [101]

Service of the within Assignment of Errors by delivery of a copy to the undersigned is hereby acknowledged this 10th day of Jan., 1918.

FLICK & PAUL,

BOGLE, GRAVES, MERRITT & BOGLE,
HUGHES, McMICKEN, RAMSEY &
RUPP,

Attorneys for Plaintiff.

[Endorsed]: Assignment of Errors. Filed in the
U. S. District Court, Western Dist. of Washington,

Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [102]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COMPANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corporation,

Defendant.

Petition for Writ of Error.

To the Hon. E. E. CUSHMAN, Judge of the District Court Aforesaid:

Comes now the City of Seattle, by Hugh M. Caldwell and Frank S. Griffith, its attorneys, and respectfully shows that on the 10th day of January, A. D. 1918, the Court found against your petitioner and in favor of the plaintiff and thereafter a final judgment was entered on the 10th day of January, 1918, against your petitioner, the defendant. Your petitioner feeling itself aggrieved by the said finding and judgment entered thereon as aforesaid, herewith petitions the Court for an order allowing it to prosecute a writ of error to the Circuit Court of Appeals of the United States for the 9th Circuit,

under the laws of the United States in such cases made and provided.

WHEREFORE, the premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Court of Appeals aforesaid sitting at San Francisco for said Circuit, for the correction of the errors complained of and herewith assigned, be allowed, and that an order be made fixing the amount of security to be given by plaintiff in error, conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of [103] of said writ of error by the Circuit Court of Appeals.

HUGH M. CALDWELL,
Corporation Counsel.

FRANK S. GRIFFITH,
Assistant.

Attorneys for Petitioner in Error.

Service of the within Pet. for Writ of Error by delivery of a copy to the undersigned is hereby acknowledged this 10th day of Jan., 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,
Of Attorneys for Plaintiff.

[Endorsed]: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [104]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Order Granting Writ of Error.

This matter coming on for hearing upon the peti-
tion of the defendant for a writ of error, and the
Court having considered said petition and being duly
advised.

IT IS ORDERED that a writ of error be granted
and that the defendant give bond in the sum of One
Thousand and no/100 Dollars conditioned as the law
directs.

Done in open court this 10th day of January, 1918.

EDWARD E. CUSHMAN,

Judge.

Service of the within Order Granting Writ of
Error by delivery of a copy to the undersigned is
hereby acknowledged this 8th day of January, 1918.

HUGHES, McMICKEN, RAMSEY &
RUPP,

Of Attorneys for Plaintiff.

[Endorsed]: Order Granting Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [105]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3561—AT LAW.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Writ of Error Bond.

KNOW ALL MEN BY THESE PRESENTS:
That we, the City of Seattle, as principal, and
Fidelity and Deposit Company of Maryland as
surety, are held and firmly bound unto Lloyd's Plate
Glass Insurance Company, a corporation, in the full
and just sum of One Thousand and no/100 Dollars
to be paid to the said Lloyd's Plate Glass Insurance
Company, its attorneys, successors, administrators,
executors or assigns, to which payment, well and
truly to be made, we bind ourselves, our successors,

assigns, executors and administrators jointly and severally by these presents.

Signed and dated this the 10th day of January, A. D. 1918.

WHEREAS, lately at a regular term of the District Court of the United States for the Western District of Washington, Northern Division, sitting at Seattle in said district, in a suit pending in said court between Lloyd's Plate Glass Insurance Company as plaintiff, and the City of Seattle as defendant, Cause No. 3561 on the law docket of said court, final judgment was rendered against the said defendant for the sum of Eight Thousand One Hundred Fifty-six and 31/100 Dollars, with interest thereon at the rate of 6%, and the said defendant has obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment of the said court in the aforesaid suit, and a citation directed to the said Lloyd's [106] Plate Glass Insurance Company, defendant in error, citing it to be and appear before the United States Circuit Court of Appeals for the 9th Circuit, to be holden at San Francisco in the State of California, according to law, within thirty (30) days from the date hereof;

Now, the condition of the above obligation is such that if the said City of Seattle, plaintiff in error, shall prosecute its writ of error to effect and answer all damages and costs if it fails to make its plea good,

then the above obligation to be void, else to remain in full force and virtue.

THE CITY OF SEATTLE.

H. C. GILL,

Mayor, Principal.

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND.

By J. A. CATHCART,

Attorney in Fact.

[Seal]

Attest: A. W. WHALLEY,

Agent.

Attest: J. P. AGNEW,

Deputy City Comptroller and ex-officio City Clerk.

Approved this the 10th day of January, A. D. 1918.

EDWARD E. CUSHMAN,

Judge.

[Endorsed]: Writ of Error Bond. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [107]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Writ of Error (Copy).

United States of America,—ss.

The President of the United States, WOODROW WILSON, to the Hon. Judge of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, between the City of Seattle, plaintiff in error, and Lloyd's Plate Glass Insurance Company, defendant in error, a manifest error has happened to the damage of the City of Seattle, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected and full and speedy justice be done to the parties aforesaid in this behalf to command you, if judgment be therein given, that under your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the 9th Circuit, together with this writ, so that you have the same at San Francisco in the State of California where said court is sitting within thirty (30) days from the date hereof in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and customs of the United States should be done. [108]

WITNESS The Hon. EDWARD D. WHITE,
Chief Justice of the United States this the 8th day of
January, A. D. 1918.

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington, Northern Di-
vision.

Allowed this the 10th day of January, A. D. 1918.

[Seal] EDWARD E. CUSHMAN,
United States Judge.

Service of the within writ of error by delivery of
a copy to the undersigned is hereby acknowledged
this 10th day of January, 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,
Attorneys for Plaintiff.

[Endorsed]: Writ of Error. Filed in the U. S.
District Court, Western Dist. of Washington, Nor-
thern Division, Jan. 10, 1918. Frank L. Crosby,
Clerk. By Ed M. Lakin, Deputy. [109]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Citation on Writ of Error (Copy).

United States of America,—ss.

To Lloyd's Plate Glass Insurance Company,
GREETING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals to be held in the City of San Francisco for the 9th Circuit, on the 4th day of March, 1918, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Lloyd's Plate Glass Insurance Company, a corporation, is plaintiff, and the City of Seattle is defendant and petitioner in writ of error, to show cause, if any there be, why the decree in said writ of error should not be corrected and speedy justice to the parties in that behalf.

WITNESS the Hon. EDWARD D. WHITE,
Chief Justice of the United States, this 8th day of
January, 1918.

[Seal]

EDWARD E. CUSHMAN,

Judge.

Service of the within Citation by delivery of a copy to the undersigned is hereby acknowledged this 8th day of January, 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,

Of Attorneys for Plaintiff.

[Endorsed]: Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [110]

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

No. —.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Plaintiff in Error.

vs.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Defendant in Error.

Stipulation as to Printing of Transcript of Record.

For the sake of brevity and to avoid unnecessary expense, IT IS HEREBY STIPULATED, between the parties hereto, that in the typewritten and printed transcript of the record of the above-entitled cause there shall be omitted from all pleadings, orders and proceedings (other than the amended complaint, demurrer thereto, order overruling said demurrer, answer, reply, petition for new trial, order overruling the said petition, general finding of fact, and judgment) the title of the court and the number and title of the cause.

IT IS FURTHER STIPULATED:

That exhibits "A" and "F" attached to the amended complaint are the same as exhibit "B" attached to the bill of exceptions, and that said exhibits "A" and "F" need not be typewritten or printed as a part of the amended complaint, but solely as exhibit "B" of the bill of exceptions.

That exhibit "G" attached to the amended complaint is the same as exhibit "C" attached to the bill of exceptions, and that it will only be necessary to print and typewrite exhibit "C" attached to the bill of exceptions.

That exhibit "E" attached to the amended complaint is the same as exhibit "D" attached to the bill of exceptions, [111] and that it will only be necessary to print and typewrite exhibit "D" attached to the bill of exceptions.

That exhibit "B" attached to the amended complaint is the same as exhibit "E" attached to the bill of exceptions, and that it will only be necessary to print and typewrite exhibit "E" attached to the bill of exceptions.

That exhibit "C" attached to the amended complaint is made a part of the bill of exceptions by reference, same being a contract of assignment between Globe Indemnity Company and Lloyds Plate Glass Insurance Company, and that in printing and typewriting the record it will be necessary to print and typewrite only exhibit "C" as attached to the amended complaint.

Dated. Seattle, Washington, January 10, 1918.

HUGH M. CALDWELL,

FRANK S. GRIFFITH,

Attorneys for Plaintiff in Error.

BOGLE, GRAVES, MERRITT &

BOGLE,

FLICK & PAUL,

HUGHES, McMICKEN, RAMSEY &

RUPP,

Attorneys for Defendant in Error.

[Endorsed]: Stipulation as to Printing Record.
Filed in the U. S. District Court, Western Dist. of
Washington, Northern Division, Jan. 10, 1918.
Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.
[112]

*In the District Court of the United States for the
Western District of Washington, Northern
Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Stipulation as to Record.

IT IS HEREBY STIPULATED, between the
parties hereto, that the clerk of this Court, in making
his return to the writ of error herein, shall include
therein the following:

Amended complaint.

Demurrer to amended complaint.

Order overruling demurrer to amended complaint.

Answer.

Demurrer to answer.

Reply.

General finding of fact.

Judgment.

Petition for new trial.

Order denying said petition for new trial.

Bill of exceptions.

Assignment of errors.

Petition for order allowing writ of error.

Order granting writ of error; and fixing amount of bond.

Bond.

Writ of Error.

Copy of writ of error lodged with clerk for defendant in error. [113]

Original citation and acceptance of service thereof.

Copy of citation lodged with clerk for defendant in error.

Stipulation as to printing transcript of record.

Stipulation as to the record.

Which comprise all the papers, exhibits, depositions and other proceedings which are necessary to the hearing of said cause upon such writ of error in the United States Circuit Court of Appeals for the Ninth Circuit, and that no other papers or proceedings than those above mentioned need be included by the clerk of said court in making up his return to said writ of error as a part of such record; provided, however, that either party may supplement the record by adding thereto any matter of record not hereinbefore mentioned.

Dated January 10th, 1918.

BOGLE, GRAVES, MERRITT &
BOGLE,
FLICK & PAUL,
HUGHES, McMICKEN, RAMSEY &
RUPP,

Attorneys for Plaintiff.

HUGH M. CALDWELL,
FRANK S. GRIFFITH,

Attorneys for Defendant.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward type-written transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

HUGH M. CALDWELL,
FRANK L. GRIFFITH,

Attorneys for Defendant.

[Endorsed]: Stipulation as to record. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy. [114]

*United States District Court, Western District of
Washington, Northern Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE,

Defendant.

**Certificate of Clerk U. S. District Court to Transcript
of Record, etc.**

United States of America,
Western District of Washington,—ss.

I, Frank L. Crosby, clerk of the United States District Court, for the Western District of Washington, do hereby certify that this typewritten record numbered from 1 to 121, inclusive, is a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on writ of error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit

Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [115]

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 304 folios at 15¢	\$45.60
Certificate of Clerk to transcript of record, folios at 15¢60
Seal to said Certificate20
	<hr/>
	\$46.40

I hereby certify that the above cost for preparing and certifying record amounting to \$46.40, has been paid to me by counsel for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and original Citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 15th day of January, 1918.

[Seal]

FRANK L. CROSBY,

Clerk United States District Court. [116]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States, WOODROW
WILSON, to the Hon. Judge of the District
Court of the United States for the Western
District of Washington, Northern Division,
GREETING:

Because in the record and proceedings, as also in
the rendition of the judgment of a plea which is in
the said District Court before you, between the City
of Seattle, plaintiff in error, and Lloyd's Plate Glass
Insurance Company, defendant in error, a manifest
error has happened to the damage of the City of
Seattle, plaintiff in error, as by said complaint ap-
pears, and we being willing that error, if any hath
been, should be corrected and full and speedy justice
be done to the parties aforesaid in this behalf to com-
mand you, if judgment be therein given, that under

your seal you send the record and proceedings aforesaid with all things concerning the same, to the United States Circuit Court of Appeals for the 9th Circuit, together with this writ, so that you have the same at San Francisco in the State of California where said court is sitting, within thirty (30) days from the date hereof in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected the said United States Court of Appeals may cause further to be done therein to correct the error what of right and according to the law and customs of the United [117] States should be done.

WITNESS the Hon. EDWARD D. WHITE,
Chief Justice of the United States this the 8th day
of January, A. D. 1918.

FRANK L. CROSBY,
Clerk of the United States District Court for the
Western District of Washington, Northern Division.

Allowed this the 10th day of January, A. D. 1918.

[Seal]

EDWARD E. CUSHMAN,
United States Judge. [118]

[Endorsed]: No. 3561. In the District Court of the United States for the Western District of Washington, Northern Division. Lloyd's Plate Glass Insurance Company, a Corporation, Plaintiff, vs. The City of Seattle, a Municipal Corporation, Defendant. Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By. Ed M. Lakin, Deputy.

Service of the within writ of error by delivery of a copy to the undersigned is hereby acknowledged this 10th day of January, 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,
Of Attorneys for Plaintiff. [119]

*In the District Court of the United States for the
Western District of Washington, Northern Division.*

No. 3561.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Defendant.

Citation on Writ of Error (Original).

United States of America,—ss.

To Lloyd's Plate Glass Insurance Company, GREET-
ING:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals to be held in the City of San Francisco for the 9th Circuit, on the 4th day of March, 1918, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein Lloyd's Plate Glass Insurance Company, a

corporation, is plaintiff, and the City of Seattle is defendant and petitioner in writ of error, to show cause, if any there be, why the decree in said writ of error should not be corrected and speedy justice to the parties in that behalf.

WITNESS the Hon. EDWARD D. WHITE, Chief Justice of the United States, this 10th day of January, 1918.

[Seal]

EDWARD E. CUSHMAN,
Judge. [120]

[Endorsed]: No. 3561. In the District Court of the United States for the Western District of Washington, Northern Division. Lloyd's Plate Glass Insurance Co., a Corporation, Plaintiff, vs. The City of Seattle, a Municipal Corporation, Defendant. Citation. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division. Jan. 10, 1918. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

Service of the within citation by delivery of a copy to the undersigned is hereby acknowledged this 8 day of January, 1918.

HUGHES, McMICKEN, RAMSEY & RUPP,
Of Attorneys for Plaintiff. [121]

[Endorsed]: No. 3112. United States Circuit Court of Appeals for the Ninth Circuit. City of Seattle, a Municipal Corporation, Appellant, vs. Lloyds Plate Glass Insurance Company, a Corpora-

tion, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed January 19, 1918.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In The United States
Circuit Court of Appeals
FOR THE NINTH JUDICIAL CIRCUIT

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

Brief of Plaintiff in Error.

HUGH M. CALDWELL,
FRANK S. GRIFFITH,
*Attorneys for the City of Seattle,
Plaintiff in Error.*

Office and Post Office Address:
527 County-City Building,
Seattle, Washington.

In The United States
Circuit Court of Appeals
FOR THE NINTH JUDICIAL CIRCUIT

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

Brief of Plaintiff in Error.

HUGH M. CALDWELL,

FRANK S. GRIFFITH,

*Attorneys for the City of Seattle,
Plaintiff in Error.*

Office and Post Office Address:
527 County-City Building,
Seattle, Washington.

In The United States Circuit Court of Appeals

For the Ninth Judicial Circuit

No. 3112.

THE CITY OF SEATTLE, a Municipal Corporation,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COMPANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This is an action brought by the Lloyd's Plate Glass Insurance Company, a corporation, to recover from the City of Seattle, in the nature of damages, certain moneys paid by the Lloyd's Plate Glass Insurance Company and the Globe Indemnity Company on policies of insurance covering the plate glass owned by divers and sundry citizens of the State of Washington, for damages to their respect-

ive property for loss of glass claimed to have been suffered by reason of the explosion of 80 per cent and 90 per cent nitro-glycerin content gelatin anchored in the harbor of Seattle awaiting a vessel to carry it to its destination, it having been shipped by the Hercules Powder Company of San Francisco, California, to the Baldwin Shipping Company at Vladivostok, Asiatic Russia, transfer at Seattle.

The City of Seattle by Ordinance No. 34379, created a fairway, subject to anchorage, consisting of all of Elliott Bay lying easterly of a straight line drawn from Alki Point to West Point. Within these waters it created a district known and designated as Elliott Bay anchorage. Within Elliott Bay anchorage the city constructed and maintained an anchorage buoy known as "Buoy No. 1." This buoy is located a half mile from the path of shipping that comes into Seattle harbor, a half mile from the wharves, docks and railways and thirteen hundred (1300) feet from a fill in Elliott Bay, known as Harbor Island, Harbor Island at the time of the explosion in question being vacant and unoccupied land. The Hercules Powder Company of San Francisco, California, shipped to the Baldwin Shipping Company at Vladivostok, via Seattle, fifteen (15) tons of 80 per cent and 90 per cent nitro-glycerin content gelatin on the "S. S. Loop," a steamer engaged in coastwise trade only. From Seattle this nitro-glycerin was to be transported to its destination on one of the Japanese Marus sailing about the time the "Loop" arrived. This

steamship could not take it, however, and it was arranged to ship it on the "S. S. Robert Dollar," a steamer sailing about a week after the Maru which was to have taken it, had sailed. It was necessary, therefore, to unload it from the "Loop" onto a scow to await the arrival of the "Robert Dollar." This scow was chartered by the Lillico Launch & Towboat Company, which was the agent of and acting for, the Hercules Powder Company, the owners of the nitro-glycerin. Without the knowledge of the port warden this scow was, on the 14th day of May, 1915, anchored to said Buoy No. 1 by the Lillico Launch & Towboat Company to await the arrival of the steamship "Robert Dollar," which was the next vessel carrying explosives bound for Vladivostok. On the night before the "Robert Dollar" was to take aboard this nitro-glycerin it was exploded by some agency unknown to anyone, but presumably by an explosive bullet fired into it or by a time bomb placed on the scow by German agents. Because of the delay in the trans-shipment of this nitro-glycerin the scow containing it was anchored at said buoy from the night of the 14th of May until the morning of the 30th of May. The result of the explosion of this dynamite was the breakage of considerable plate glass in the City of Seattle owned by divers and sundry persons, citizens and residents of the City of Seattle, as more fully appears from Exhibits "B" and "C." The Lloyd's Plate Glass Insurance Company and the Globe Indemnity Company had issued policies of

insurance to these various persons insuring them against loss on plate glass. Under these policies the companies replaced the glass and filed claims against the City of Seattle for the amounts paid for the replacing of glass under their respective policies. The persons who actually suffered the damage to their property by reason of the explosion never filed any claims against the City of Seattle as required by law, or at all, nor was there any authority granted by said persons, or any or either of them, to the Lloyd's Plate Glass Insurance Company, or to the Globe Indemnity Company, or their, or either of their agents or servants, to file any claim for them, or on their behalf, against the City of Seattle. The Globe Indemnity Company assigned its pretended claim to the Lloyd's Plate Glass Insurance Company and this latter company commenced suit against the City of Seattle to recover what they had both paid out by virtue of their several policies, charging the city with liability by reason of the negligence of its port warden, and, with the creation of a nuisance permitting nitroglycerin in foreign commerce to be anchored at Buoy No. 1 in the harbor of Seattle.

The question of negligence was waived by the failure to introduce any testimony showing acts of negligence and the case rested upon the question of nuisance. It was clearly shown by the testimony that Buoy No. 1 was a safe and proper place for the anchorage of vessels carrying as cargo, or part cargo, explosives of the kind contained on the

scow anchored at said buoy, and that the Harrison Street Powder Dock, a place appointed by the city for the handling of powder locally, was not a safe place for the storage of such explosives, and that had this amount of nitro-glycerin exploded at the latter dock the opportunity for loss of life would have been very great. The testimony, we believe, without dispute shows that from the time of the establishment of the Harrison Street pier as a powder dock there had never passed over or through, nor had there ever been stored on, said dock any explosive in any form in foreign commerce; that nothing but powder and explosives for transportation or use inland had ever been stored or unloaded at said Harrison Street pier; that all vessels engaged in interstate and foreign commerce arriving in the harbor of Seattle carrying explosives for transshipment by water, were all anchored, and the explosives transferred, either at Buoy No. 1 or at some other place on the water within Elliott Bay. The Court in ruling upon the case as submitted agreed that Buoy No. 1 was a safe place for the handling of explosives in commerce, but held that the port warden of the City of Seattle by permitting this scow of nitro-glycerin destined for Vladivostok to anchor at Buoy No. 1 instead of requiring the same to tie up to the Harrison Street dock, violated the terms of Ordinance No. 34379 and thereby created a nuisance for which the city was liable. The City of Seattle took due exception and brings the case to this court for review.

SPECIFICATIONS OF ERROR.

1. The court committed error in overruling the City of Seattle's demurrer to the amended complaint.

2. The court committed error in receiving in evidence the claim of the Lloyd's Plate Glass Insurance Company, Exhibit B, and the claim of the Globe Indemnity Insurance Company, Exhibit C, and in holding that the claims and each of them were sufficient in law.

3. The court erred in holding, as a matter of law, that the port warden of the City of Seattle created a nuisance, for which the City of Seattle was responsible, by permitting a vessel with a cargo of nitro-glycerin in transit from the Port of San Francisco, in the United States, to the Port of Vladivostok, in Asiatic Russia, to be anchored at Buoy No. 1, established in Seattle harbor in aid of commerce.

4. The court erred in holding, as a matter of law, the City of Seattle liable for the act of its officer, the port warden, while engaged purely in a governmental function.

5. The court erred in holding, as a matter of law, the City of Seattle liable for the results of an explosion of nitro-glycerin anchored in Seattle harbor and over which nitro-glycerin the city could not and did not exercise any control or jurisdiction, it being in transit in foreign commerce.

6. The court erred in denying plaintiff's motion to dismiss urged at the close of plaintiff's testi-

mony, renewed and again urged at the close of all the testimony.

7. The court erred in entering judgment in favor of Lloyd's Plate Glass Insurance Company and against the City of Seattle.

ARGUMENT.

THE COURT ERRED IN OVERRULING THE DEMURRER OF THE PLAINTIFF IN ERROR TO THE AMENDED COMPLAINT OF THE DEFENDANT IN ERROR.

We do not enter upon an extended discussion of this point at this place because, the arguments advanced on the other errors assigned are applicable to this error, and we ask the court to consider them as having been addressed to this point.

II.

THE COURT COMMITTED ERROR IN RECEIVING IN EVIDENCE THE CLAIM OF THE LLOYD'S PLATE GLASS INSURANCE COMPANY "EXHIBIT B," AND THE CLAIM OF THE GLOBE INDEMNITY INSURANCE COMPANY, "EXHIBIT C," AND IN HOLDING THAT THE CLAIMS AND EACH OF THEM WERE SUFFICIENT IN LAW.

Before an action can be commenced against the City of Seattle for damages sounding in tort, a claim must be presented to the City Council and filed with the city clerk, as provided by Sec. 29 of Article IV of the Charter of the City of Seattle:

"Sec. 29. CLAIMS FOR DAMAGES,

WHEN AND HOW PRESENTED: All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

as reinforced by Sections 7995, 7996 and 7997 of Rem. & Bal. Code of the State of Washington, as follows:

"§ 7995. FIRST CLASS CITIES — CLAIM MUST STATE RESIDENCE. Whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or other

proper officer of such city, in compliance with valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued."

"§ 7996. CUMULATIVE WITH CHARTER PROVISIONS. Nothing in this act shall be construed as in any wise modifying, limiting or repealing any valid provision of the charter of any such city relating to such claims for damages, but the provisions of this act shall be in addition to such charter provision, and such claim for damages, in all other respects, shall conform to and comply with such charter provisions."

"§ 7997. PROVISIONS MANDATORY. Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages."

None of the parties whose property was actually damaged filed claims with the City of Seattle, nor did any of them authorize either the Lloyd's Plate Glass Insurance Company or the Globe Indemnity Insurance Company to file a claim for them, but the Lloyd's Plate Glass Insurance Com-

pany and the Globe Indemnity Insurance Company on their own motion filed claims against the city for the loss they paid on the policies of insurance held by the individuals in said companies. All the policies were identical and contained the following clause:

“4. The company shall be subrogated to all rights which the assured may have against any person, partnership, corporation, or estate, as respects any payment made under this policy, *and the assured shall execute all papers required to secure to the company such right.*”

Record, p. 100.

We contend that under the charter and the laws of the State of Washington the person actually suffering the damage to his property can alone file a claim against the city for such damage. Neither the Lloyd's Plate Glass Insurance Company nor the Globe Indemnity Insurance Company suffered any damage to its property. They simply compensated the individual claiming to have suffered damage for his loss because, forsooth, the individual was insured against loss in one or the other of said companies. Record, pp. 39, 89. The Supreme Court of the State of Washington in construing the law relative to claims against municipal corporations has held uniformly that one of the purposes of requiring a claim to be filed was to give the city authorities an opportunity not only to investigate the claim *but also to investigate the claimant.*

Cole v. Seattle, 64 Wash. 1.

Collins v. Spokane, 64 Wash. 153.

The real claimant, in the purview of the charter and laws of the State of Washington, is the person who actually suffers the damage to his property or person.

Haynes v. Seattle, 83 Wash. p. 51, is a case where the daughter suffered injuries on account of the negligence of the city. Her father filed a claim against the city. The Supreme Court of Washington, in construing the right of a third person to file a claim for the injured person, said:

“The statute establishes the public policy of the state, and the same dignity must be accorded to charter provisions with a like period of limitation in cities of the first class.

* * * The claim presented by the father did not comply with the provisions of the city charter because it was not ‘sworn to by the claimant.’ In *Cole v. Seattle* we held that this clause was reasonable and that it was ‘an earnest of that good faith which the city has a right to demand.’ ”

This case, we think, is on all fours with the case at bar, the claims in issue here, like the claims in the Haynes case, were not sworn to, nor filed, by the real claimants. The insurance companies had the right under the clause of their policies, above quoted, to require all those persons suffering injury to their property to file a claim against the city. In fact, this is the only right the insur-

ance companies had. That provision was incorporated in their policy to cover just such contingencies as arose here. The companies having failed to make that requirement but assuming to file a claim for themselves only, not even purporting to be on behalf of the persons actually injured, cannot maintain this action. The claims were wrongfully admitted in evidence and wrongfully held to be sufficient in law.

III.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THAT THE PORT WARDEN OF THE CITY OF SEATTLE CREATED A NUISANCE, FOR WHICH THE CITY OF SEATTLE WAS RESPONSIBLE, BY PERMITTING A VESSEL WITH A CARGO OF NITRO-GLYCERIN IN TRANSIT, FROM THE PORT OF SAN FRANCISCO, IN THE UNITED STATES, TO THE PORT OF VLADIVOSTOK, IN ASIATIC RUSSIA, TO BE ANCHORED AT BUOY NO. 1, ESTABLISHED IN SEATTLE HARBOR, IN AID OF COMMERCE.

Constitution, State of Washington, Art. XI, paragraph 11, provides:

“Any county, city, town, or township, may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.”

Sec. 7507, Rem. & Bal. Code of Washington, paragraph 27, provides:

“Any such city (as the City of Seattle) shall have power—

“27. To control, regulate, or prohibit the anchorage, moorage, and landing of all water crafts and their cargoes within the jurisdiction of the corporation.”

Article IV, Sec. 18, paragraph 27th, Seattle City Charter, provides:

“The city council shall have power by ordinance and not otherwise—

“Twenty-seventh. REGULATION OF WATER CRAFT: To control, regulate and prohibit the anchorage, moorage and landing of all water craft and their cargoes within the jurisdiction of the corporation.”

By virtue of this faundamental authority the city council of the City of Seattle passed Ordinance No. 34379. Section 1 provides:

“Section 1. The City of Seattle in the exercise of its police power hereby assumes control and jurisdiction over all navigable waters within the City of Seattle over which the city has control and jurisdiction, and such waters shall, for the purpose of this ordinance, be known as ‘Seattle Harbor.’ ”

Record, p. 50.

Section 2 defines vessel as follows:

“Section 2. The word ‘vessel’ shall include ships, boats, steamers, *scows*, *barges* and other structures adapted to navigation or move-

ment from place to place by water."

Record, p. 50.

Section 4 of this ordinance provides that the master of every vessel entering the harbor between 8:00 A. M. and 5:00 P. M. except vessels carrying cargoes, or part cargoes of explosives, and coast-wise vessels, shall report to the port warden. Record p. 50.

Section 7, after describing and naming the "fairways," provides:

"It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie or make fast such vessel in any such fairway for a longer period of time than reasonably sufficient to load or unload the same, *except that the port warden may, in his discretion, grant any permit for the use of any such fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for.*"

Record p. 51.

Section 8 defines the district known as Elliott Bay anchorage and within which Buoy No. 1 is located. Record p. 52.

Section 9 provides for fees for anchorage of vessels to city buoys. Record p. 52.

Section 19 provides:

"It shall be unlawful for any person to *handle or store on any pier, other than a pier*

*pecially designated for such purposes, any explosive * * * whose contents would be liable to cause danger * * *.*

Record p. 53.

Section 33 provides no master or other person in charge of any vessel shall attach the same to a city buoy until permission from the port warden has been obtained. Provided, if a vessel be attached to such buoy in the night the person in charge shall notify the port warden at 8:00 o'clock A. M. the next day "the name and character of such vessel, and *the probable length of time it is desired to remain at said buoy.* Should more than one vessel or obstruction apply for the use of any particular buoy, the port warden shall be the sole judge as to which shall occupy the same, and his decision shall be final and conclusive." Record p. 54.

Paragraph 3 of Section 38 provides:

"Every vessel lying *at any powder dock or at anchor within Seattle harbor*, which has a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives, in any form" shall display certain signals as provided in International Code Flag "B." Record p. 55.

Paragraph 4 of Section 38 provides:

"No person shall on any pier, or other structure, except on the powder dock or *on powder boats*, within Seattle Harbor, store or have on hand for sale, or sell, or keep any

powder, ignition caps, dynamite or other like explosive, either by day or night."

Record p. 55.

Paragraph 11 of Section 38 provides:

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a *city buoy*, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew, which shall at all times display the required signals and be ready to and have authority to immediately move such vessel when emergency requires, or when required by the port warden."

Record p. 57.

Paragraph 16 of Section 38 provides:

"When, *in the judgment of the port warden*, any person to whom any permit has been issued under the provisions of this ordinance for the handling of explosives, shall have violated any of the terms of such permit, it shall be his duty to revoke said permit forthwith."

Record p. 58.

Section 39 of said ordinance provides:

"The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, *and as a place* for vessels carrying as cargo, or part cargo, such explosives."

Record p. 58.

From the provisions of Sec. 11 of Art. XI of the constitution of the State of Washington it unequivocally appears that the City of Seattle in the exercise of its police power has authority to make and enforce within its limits such local, *police* and sanitary regulations as are not in conflict with the general laws. It likewise appears that, in addition to this power, the legislature has granted to the city the right to control, regulate or prohibit the anchorage, moorage and landing of all water craft and their cargoes within its jurisdiction. This authority given by the constitution and the legislature was accepted by the people of the city and adopted as part of such charter, in the exact language of the enactment of the legislature. To carry into effect these powers granted to, and accepted by, the city, the charter of Seattle, Article XII, provides for a harbor department. Section 3 of Article XII of the charter provides for the regulation of wharves and wharfage, and is as follows:

“Sec. 3. REGULATION OF WHARVES AND WHARFAGE: The city council shall, by ordinance, regulate the tolls for wharfage, dockage and other charges at all wharves, slips, docks and landing places within the city, and provide for the regulation of berths and landing of all steamers, sail vessels, barges or other water craft, and shall exercise in regard to all such wharves, slips, docks and landing places such other control not herein specified as shall not be inconsistent with the laws

of the United States and of the State of Washington.” Record p. 64.

Section 5 provides for the appointment of a port warden, and is as follows:

“Sec. 5. PORT WARDEN: The mayor, by and with the advice and consent of the city council, shall appoint a port warden, who shall perform such duties not inconsistent with this charter, in relation to harbors and wharves, as may be prescribed by ordinance, and who shall be deemed the head of the harbor department.” Record p. 64.

By virtue of and in consonance with, these constitutional, statutory and charter, powers of the city council, the legislative body of the City of Seattle, passed Ordinance No. 34379. By Section 1 of this ordinance the City of Seattle expressly announces its intention to exercise its *police power* over the navigable waters within the City of Seattle, known as Seattle Harbor. Section 2 defines “vessel” to include “scows” and “barges.” Section 7 provides “that the port warden may, *in his discretion, grant any permit for the use of any fairway for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel.*”

We pause here to suggest to the court, that the place where, and the length of time that, any vessel carrying a cargo of recognized articles of commerce, may lie at anchor, or be moored in Elliott Bay, is placed wholly within the discretion of the port war-

den. It is well known, and this court will take judicial knowledge of the fact, that nitro-glycerin, 80 and 90 per cent gelatine content, otherwise known as gelatine dynamite, is a recognized article of commerce. It is likewise known that it becomes part of the cargo of vessels. The constitution makers, the legislature, the people of Seattle, and the legislative body of said city fully knew this fact when they gave to the port warden the discretion relative to the place where, and the length of time that, such vessels should be permitted to lie at anchor in the harbor of Seattle. Therefore, when the port warden of the City of Seattle granted a permit to the Lillico Launch & Towboat Company to anchor the vessel loaded with nitro-glycerin, in transit to Vladivostok, Russia, at Buoy No. 1 for the length of time it was anchored there, he exercised the discretion granted to him by the legislative authority of the city. This is emphasized by Section 33 of Ordinance No. 34379 which requires the master of a vessel attaching it to any buoy to notify the port warden the *probable length of time* he desires to remain at such buoy, and makes the port warden the sole judge as to which vessel, when more than one applies, shall occupy any particular buoy and makes his decision "final and conclusive." Record, p. 54. No where in this record is it shown or claimed that the anchoring of this scow (vessel) at Buoy No. 1 interfered with "the use of the fairway by any other vessel." It cannot be, nor is it, contended that the port warden abused the discre-

tion with which he was clothed. It is so well settled, both by precedent and authority, that where a discretion in the performance of an act or duty is vested in a public official, that public official, or the entity of which he is an official, will not be liable for the results of the exercise of that discretion, where the same is fairly and honestly exercised, as the record shows it to have been in this case. We deem it unnecessary to cite to this court cases to sustain this principle. The city council of the City of Seattle recognized the necessity of reposing in the officer empowered by the charter with the enforcement of ordinances regulating the anchorage and moorage of vessels in the harbor, a wide discretion; it also knew and recognized, as everyone else did, that in a port like the Port of Seattle there would arrive in its harbor vessels carrying explosives, both for foreign shipment and local consumption. It also knew that it would be necessary to anchor, moor or tie such vessels to the buoys provided by the City of Seattle, as an aid to commerce, for varying periods of time. It further knew that explosives in quantities could be shipped only on those vessels engaged in that particular business. It likewise knew that it could not prohibit or interfere with the shipment of explosives either in inter-state or foreign commerce. It further knew that vessels sailing coastwise, carrying explosives to be re-shipped to a foreign port, would enter Seattle harbor, and varying periods of time must elapse between the arrival of the coast-

wise vessel and the sailing of the vessel foreign. With this knowledge, aided by the experience of the port warden, it reposed in the port warden a discretion to permit any vessel carrying explosives as cargo or part cargo to lie at anchor or be moored to any buoy in Seattle harbor for such period of time as shipping conditions might warrant. Throughout Ordinance No. 34379 the right of vessels either to lie at powder docks, to be moored to buoys, or to ride at anchor in Seattle harbor, is recognized and permitted. Thus in section 33 it is said:

“Provided, that during the night or in bad weather such vessel or obstruction may be attached to any vacant city buoy, but the master, owner or person in charge thereof shall notify the port warden not later than eight (8) o'clock, a. m. of the next legal day of such act, stating the name and character of such vessel or obstruction and the *probable length of time* it is desired to remain at said buoy. Should more than one vessel or obstruction apply for the use of any particular buoy, the port warden shall be the sole judge as to which shall occupy the same, and his decision shall be final and conclusive.”

Record p. 54.

And in paragraph 3 of Section 38:

“Every vessel lying at any powder dock or at anchor within Seattle Harbor, which has a cargo, or part cargo, of dynamite, * * *

or other explosive or explosives in any form."

Record p. 55.

And again in paragraph 4 of Section 38:

"No person shall on any pier, or other structure, *except on the powder dock or on powder boats, within Seattle Harbor, store*
* * * or keep any powder, ignition caps, dynamite or other like explosive, * * *."

Record p. 55.

Again in paragraph 11 of Section 38:

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a *city buoy* or alongside the powder dock * * *."

Record p. 57.

And again in paragraph 6 of said section:

"*When in the judgment of the port warden* any persons to whom any permit has been issued under the provisions of this ordinance for the handling of explosives shall have violated any of the terms of such permit it shall be his duty to revoke said permit forthwith."

Record p. 58.

These provisions not only recognize the right of vessels (which include *scows* and *barges*) having as cargo or part cargo explosives in any form, to anchor or to tie up to the buoys in Seattle harbor, as long as in the judgment of the port warden they do not interfere with any other vessel, but expressly grant such right.

It is argued by defendant in error that Section 39 not only denies any discretion to the port war-

den, but in terms prohibits the port warden from permitting any vessel entering Seattle harbor carrying explosives in any form, to lie, or be, at any other place therein, except at the Harrison Street municipal pier, which is temporarily appointed as a powder dock. The language of that section is:

“The Harrison Street Municipal Pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, and as a place for vessels carrying as cargo or part cargo such explosives.”

Record p. 58.

It is contended that the word “exclusively” as used in this section applies to the anchoring and tying up of vessels. It is a fundamental rule of construction that, first, the intent of the legislative body shall control; second, that an ordinance or statute shall be so construed as to give effect to all of its provisions; third; that words must be given their ordinary and usual meaning; and fourth, that nothing should be added or eliminated unless necessary to give sense to that which remains. Applying these rules to the construction of this ordinance such contention cannot be maintained. The word “exclusively” as used in Section 39, is used in conjunction with and as limiting the kind of freight, to be handled on the Harrison Street municipal pier, to powder, dynamite and other like explosives, not as limiting the place or places where vessels carrying such explosives as cargo or part

cargo should be moored, anchored or tied; for in paragraph 11 of Section 38 it is said:

“Every vessel carrying a cargo of explosives in any form while lying *at anchor* or *at a city buoy* or alongside the powder dock shall at all times, etc.”

Record p. 57.

If it was the intention of the law-makers that the word “exclusively” should be applied to the powder dock, as a place for vessels carrying cargo or part cargo of explosives, to lie, why did they in express language in the preceding section recognize the right of a vessel to lie “at anchor or at a city buoy” as well as at the powder dock? That the word “exclusively” was intended to apply to the kind of freight handled at the Harrison Street municipal pier is reinforced when we consider the usual meaning attributed to the word “handling.” Webster defines “handling” as “manipulation, a touching or using with the hand.” Hence, the phrase “for handling of powder, dynamite and other like explosives” means that nothing but dynamite, powder and like explosives shall be there handled, to the exclusion of all other kinds of merchandise or freight. Taking this ordinance as a whole the clear intention of the lawmakers was that Section 39 should read:

The Harrison Street municipal pier is hereby designated temporarily as a powder dock to be used exclusively for the handling of powder, dynamite and other like explosives and *also* as one of the places in Seattle Harbor

for vessels carrying as cargo or part cargo such explosives.

This construction gives effect to all of the provisions of the ordinance and permits them all to be effective. It is the construction placed upon the ordinance by those charged with the duty of its execution.

The construction of this ordinance by the department charged with its enforcement, while not controlling on the courts, is entitled to great respect.

In *Edwards v. Darby*, 12 Wheat. 206, 6 L. Ed. 603, the Supreme Court of the United States said:

“In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.”

In *United States v. MacDaniel*, 7 Pet. 1, 8 L. Ed. 587, at page 592, the court says:

“A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by the law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such

principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits. And no change of such usages can have a retrospective effect, but must be limited to the future.

“Usage cannot alter the law, but it is evidence of the construction given to it, and must be considered binding on past transactions.”

In *United States v. Moore*, 95 U. S. 763, 24 L. Ed. 588, at page 589, the court says:

“The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons. The officers concerned are usually able men, and masters of the subject. Not unfrequently they are the draftsmen of

the laws they are afterwards called upon to interpret.”

In *Brown v. United States*, 113 U. S. 568, 28 L. Ed., 1079, at page 1080, the court said:

“These authorities justify us in adhering to the construction of the law under consideration, adopted by the executive department of the government.”

This court recognized and adopted this rule in *Baker v. Swigert*, 199 Fed. 865, at 867. So has the Supreme Court of Washington in *Reagan v. School Dist.*, 44 Wash. 523.

If the construction of this section as contended for by defendant in error was permitted it would act as a repeal of all the provisions of the ordinance relative to the discretion vested in the port warden and the continued recognized right of vessels, carrying cargoes of explosives in any form, to anchor anywhere the port warden may permit them in the harbor, as well as all of the provisions of said ordinance permitting the transfer of explosives from one vessel to another in Seattle Harbor. Were it the intention of the legislative body to limit the place in the harbor, where vessels, carrying as cargo or part cargo explosives, should lie, to the Harrison Street municipal pier, how easy it would have been for them to have used words indicating such an intention rather than the words “*and as a place* for vessels carrying as cargo or part cargo such explosives,” and the words in Section 38—

“Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a

city buoy, or alongside the powder dock,”
and the words,

“Every vessel engaged in the transfer of
any explosive from one vessel to another within
Seattle Harbor shall, etc.,”

and the words,

“Every vessel whether lying at anchor or
at a city buoy or in any other position within
Seattle Harbor, engaged in the transfer of
explosives, etc.”

That the legislative body intended the powder
dock to be but one of several places where vessels
might anchor or tie up is made more impressive
by the language used in paragraph 11 of Section 38,
where it is said:

“Every vessel carrying a cargo of explos-
ives in any form while lying at anchor or at a
city buoy or alongside the powder dock shall
at all times, etc.”

Here is an express recognition of three lawful
places where vessels carrying explosives in any form
may come to rest in Seattle Harbor. Why, if the
legislative body intended the word “exclusively” in
Section 39 to apply to the place of tying up of ves-
sels, did it designate the three places in Section 38?
The designation of these three places is conclusive
to our mind that it intended the powder dock to be
but one place where vessels might tie up and come
to rest. As one of the reasons for the construction
of this ordinance, as contended for by defendant
in error, the court intimated, that because the word

“dynamite” was used in Section 39, and the words “explosives in any form” were used in paragraph 11 of Section 38, that a ship carrying dynamite could only anchor at the powder dock. (Record p. 86.) With all due respect to the learning and ability of the *nisi* court this construction is too strained for adoption. The words “explosives in any form” contained in paragraph 11 of Section 38 mean explosives in *all and every form*.

It is said by the Supreme Court of the United States in the case of *Chicot County v. Lewis*, 103 U. S. 164, 26 L. Ed. 495, in construing an Act of the General Assembly of the State of Arkansas which provided “That *any county* in this State may subscribe to the stock of *any railroad* in this State, now chartered or incorporated or which shall hereafter be chartered or incorporated * * * not to exceed \$100,000,000,” as follows:

“The State did not restrict the County to a single subscription. The language is: ‘Any county in this State may subscribe to the stock of any railroad in this State, * * * and may issue bonds for the amount, etc., provided that the amount of *such subscription* shall not exceed \$100,000.’ That is, the power to subscribe is general, but no subscription shall exceed \$100,000. The meaning might have been more distinctly expressed by using the plural, ‘any railroads,’ and making the proviso to read, ‘the amount of such subscription shall not exceed \$100,000 to any one railroad’; but

the same sense is sufficiently indicated by the words actually employed. *The power given is a power to subscribe to any railroad. This includes all railroads in the State, without restriction.* * * * The law simply meant to give the county full liberty on the subject, limiting only the amount of a single subscription. That the limitation contained in the proviso has reference to a single subscription only is apparent from a bare reading of the context. Omitting surplus words, the section reads thus: 'Any county in this State may subscribe to the stock of any railroad in this State, and issue bonds therefor: *Provided*, That the amount of *such subscription* (that is the subscription to any railroad) shall not exceed \$100,000.' Here the words: *any railroad*, are used *distributively*, including *all railroads* taken severally; and the limitation has reference to the subscription to any railroad, that is to any one railroad taken separately. *Had the Legislature desired to limit the power of subscription to \$100,000, the natural and appropriate mode of doing so would have been either to limit the County to one subscription not to exceed \$100,000, or to provide that the amount of its subscription should not in the aggregate exceed \$100,000. Neither of these things was done.* As the law stands, it confers a general power to subscribe to the stock of any rail-

road in the State for any amount not exceeding \$100,000.

This construction of the statute disposes of the case.” (Italics supplied.)

The meaning of the word “any,” used similarly, is learnedly discussed by the Civil Court of Appeals of Texas, in the case of *McCuiston v. Fenet*, 144 S. W., 1155, and by the Supreme Court of Michigan in *Hopkins v. Sanders*, reported in 137 N. W., at page 709. In the latter case, the court, in construing the words “before *any suit* at law or in chancery shall be commenced in *any circuit court*,” and “before the entry of *any final judgment*,” said:

“In broad language it covers ‘any final decree’ in ‘any suit at law or in chancery’ in ‘any circuit court.’ ‘Any’ means ‘every,’ ‘each one of all,’ and, by its general significance, in this connection includes the circuit court for the County of Wayne.”

The city council in using the words, “every vessel carrying a cargo of explosives *in any form*,” in paragraph 11 of Section 38 of the ordinance, intended the word “any” to mean all and every kind of explosives that were permitted in commerce. To deny to those words this meaning would be to defeat the intent of the legislative body. The law does not tolerate a construction which defeats the apparent will and intent of the legislative body. From these observations we have seen that the constitution, the legislature and the people of Seattle

have authorized the permitting of vessels containing cargo or part cargo of explosives to be anchored at Buoy No. 1 in Seattle harbor, and have vested in the port warden, the executive officer of the harbor department, the discretion as to the length of time that any such vessel so laden may lie at anchor or at a buoy in Seattle harbor. Therefore, in view of the provisions of Section 8311, Rem. & Bal. Code, viz:

“NOTHING WHICH IS DONE OR
MAINTAINED UNDER THE EXPRESS
AUTHORITY OF A STATUTE CAN BE
DEEMED A NUISANCE.”

it cannot be said that the City of Seattle, by permitting a vessel loaded with explosives, recognized by the United States as articles of commerce, to be moored to a buoy, awaiting a ship to carry such explosives to their destination, under the express authority of paragraph 11 of Art. XI of the constitution of Washington, and Sec. 7507 of Rem. & Bal. Washington Code, was maintaining a nuisance. While Sec. 8308, Rem. & Bal. Washington Code, enumerates public nuisances, and Sec. 8309 defines what is a nuisance, we challenge counsel under the testimony and record in this case to point out what act or acts of the port warden constituted a nuisance in view of the provisions of Sec. 8311 of said code.

The defendant in error offered in evidence the fire patrol ordinance of the City of Seattle, over the objection of plaintiff in error. The harbor

ordinance, No. 34379, passed long after this fire patrol ordinance, which is No. 28324, is complete in itself and covers fully the subject made relative to shipping in Seattle Harbor, as authorized by the legislature of the State of Washington. If there were any conflict in these ordinances the harbor ordinance would prevail. But there is no conflict. The harbor ordinance was intended to cover the harbor and all activities therein. The fire patrol ordinance was intended to minimize fire hazards and control the handling of explosives on land within the limits of the city, other than at the powder dock. This is clear from the language of the sections of that ordinance in this record. Section 24 provides that all explosives must be removed beyond the city limits at night, "provided that this provision shall not apply to the master or other person in charge of any steamboat or vessel transporting any such explosives." Record, p. 59. Section 26 requires every master or other person in charge of any steamboat, vessel or other water craft, having on board any explosives, to immediately upon arrival notify the harbor master in writing of the amount of such explosives on board and obtain from the harbor master a permit *to land* such explosive substances, which permit shall specify the *dock* or *wharf* where such explosive substances may be *landed*, and the time when the same shall be *unloaded*. Record, p. 60. All such explosive substances shall be discharged, *landed* or unloaded under the supervision of the chief of the fire de-

partment and shall be immediately transported to some point without the limits of the city. Nothing could be clearer than that this ordinance No. 28324 was intended purely and solely to cover and control the landing, handling and sale of explosives on the land. If this were not true why did it except from its provisions "any ship or vessel in the harbor having on board explosives?" Clearly the City of Seattle was not maintaining a nuisance by permitting a vessel with a cargo of nitro-glycerin destined for a foreign port to be anchored in Seattle harbor?

Especially is this true when by paragraph 4 of Sec. 38 of ordinance No. 34379, it is provided that the only places in the city where explosives may be kept or stored are on the powder dock and on *powder boats within Seattle harbor.*

The case of "The Ingrid," reported in 195 Fed. Rep. at page 596, is on all fours with the instant case. There, there was an explosion by dynamite that had been held on a *pier* for a week awaiting shipment foreign. It exploded, breaking large quantities of glass, causing great loss of life and the destruction of the vessel "The Ingrid." An action was brought by the owner and captain of "The Ingrid" to recover damages caused by this explosion. It was charged in that case that the place where the dynamite was delivered for transportation was an improper place, and that the railroad company transporting the explosives had violated the law of New Jersey and the ordinance of Jersey

City in respect to the storage of explosives. Holt, District Judge, in disposing of these questions, said:

“It is claimed that the pier was an improper place on which to deliver such a quantity of dynamite. But this claim seems to me untenable. Pier 7 was the pier farthest south in the Railroad Company’s yards. It was as far removed from the other property in the yard as the car could be placed. It is claimed that railroad companies should be required to obtain a pier in an isolated part of the shore of the harbor. Aside from the physical difficulty and practical impossibility of all the great railroad lines which come into New York obtaining such piers, it is sufficient to say that the state of New Jersey has not passed any law requiring it, and, in the absence of such a law, I do not think that the railroad company in this case should be held liable to any such extreme precaution. * * * If it were to be held that any one who makes use of such instrumentalities as steam, gas, gasoline, gunpowder, and dynamite is an absolute insurer against any injury resulting from their explosion, irrespective of any question of negligences, it would largely restrict the use of such agencies. I think that the dynamite exploded on Pier 7 was in course of transportation by the Railroad Company, that there was no negligence by the Railroad Company either

in permitting the car to stand at the end of the pier as long as it did, or in any other respect. * * *

“The libelant claims that the Railroad Company violated the law of New Jersey, and the ordinances of Jersey City, in respect to the storage of explosives. In the first place, in my opinion, the liability of the Railroad Company, while transporting this dynamite, was governed exclusively by the act of Congress of March 4, 1909, which provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives which shall be binding on all common carriers engaged in interstate or foreign commerce which transport explosives by land. Under this act, the Interstate Commerce Commission has formulated and issued regulations for the transportation of explosives, and it is not claimed that those regulations have not been complied with by the defendants. Congress having passed such a law, it clearly governs in my opinion all common carriers who come within its provisions, and takes the place of all local laws and ordinances on the subject. *Southern Ry Co. v. United States*, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. —; *Northern Pacific Ry. Co. v. State of Washington*, 222 U. S. 370, 32 Sup. Ct. 160, 56 L. Ed. —; *Southern Ry. Co. v. Reid*, 222 U. S. 424, Sup. Ct. 140, 56 L. Ed. 424. If it did not, a railway company

transporting dynamite over a long railroad system, passing in the trip through various villages, cities, and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe. It is pre-eminently just that in such cases there should be a central authority, prescribing what the Railroad Company, in the transportation of such explosives, should do. The fact that the bill of lading only described the shipment as being from Kenvil to Communipaw, within the state of New Jersey, did not change the fact that as to the 300 cases addressed to Carlisle, Crocker & Co., Montevideo, it was a foreign shipment. *Gulf, etc. R. R. Co. v. Fort Grain Co.* (Tex. Civ. App.) 72 S. W. 419.

Even if there were no act of Congress in existence, I think that there is nothing in the statutes of New Jersey or the ordinances of Jersey City which applies to this case. Those statutes and ordinances all apply, in my opinion, to the case of persons manufacturing explosives or storing and keeping them permanently in cities or dangerous places. There are expressions in these statutes and ordinances prohibiting any one from 'having or keeping' explosives except under certain restrictions, but it is apparent from the context that those expressions refer to having or keeping explosives on permanent storage, or for

sale, or while manufacturing them. They do not apply in my opinion to a railroad company transporting them from one place to another."

Judgment was entered dismissing the action against the respondents. This case was appealed to the Circuit Court of Appeals for the Second Circuit, and this court in disposing of the case, speaking through Rodgers, Circuit Judge, 216 Fed. Rep., page 78, said:

"The general and fundamental rule is that, the damage complained of must come from a wrongful act. In Addison on Torts, vol. 1, p. 3, the law is stated as follows:

'A man may, however, sustain grievous damage at the hands of another, and yet if it be the result of inevitable accident, or a lawful act, done in a lawful manner without any carelessness or negligence, there is no legal injury and no tort giving rise to an action for damages.'

"We are unable to discover that either the railroad company or the powder company or the contractor Healing, or any of the employes of either, committed any wrongful act which caused this explosion.

At the time of the explosion the dynamite was in the course of transportation. * * *
We think there can be no doubt, so far as a common carrier is concerned, that such danger as necessarily results to others from the per-

formance of its duty, without negligence, must be borne by them as an unavoidable incident of the lawful performance of legitimate business. * * *

“It certainly would be an extraordinary doctrine for courts of justice to promulgate to say that a common carrier is under legal obligation to transport dynamite and is an insurer against any damage which may result in the course of transportation, even though it has been guilty of no negligence which occasioned the explosion which caused the injury. It is impossible to find any adequate reason for such a principle.

But it was urged upon us in the argument that the facts in the case clearly establish the existence of a nuisance. Car 91,442 had been forwarded on January 24th, and on January 25th the powder company received notice of its arrival. The next day the powder company removed 200 cases from the car, and placed them on a storage barge which belonged to it, and anchored it down the bay, in accordance with a practice it had followed for ten years. Nothing was done on January 27th to unload the balance of the car. On January 28th there were 170 cases more removed from the car for an export shipment. The remaining 300 cases were to be placed on board a steamer which it had been expected would sail on January 25th, but which was delayed in its sail-

ing. Under the established rules, the explosives could not be placed on board the steamer until her other cargo had been loaded. Then the explosives had to be taken to her on a lighter and put on board at Gravesend Bay. As soon as the steamer was ready to receive the cargo, the unloading of the dynamite remaining in the car commenced. * * *

"We are asked to hold the respondents responsible for the damages upon the theory that, even though they were not guilty of negligence, they were guilty of a nuisance in keeping on pier 7 the dynamite which caused the damage. * * *

"This pier 7 was used for the shipment of explosives, and the testimony shows that the locality was a suitable one for the purpose. We cannot think that under the circumstances it was an improper place on which to deliver dynamite. * * *

"Then it has been urged upon us that, as the 300 cases of dynamite were allowed to remain in the car for six days, they are to be regarded as having been practically in storage, and that pier 7 was an improper place in which to store so large an amount of explosives. But where should they have been removed to? There was no place in Jersey City for the purpose. And we agree with the court below in its opinion that the dynamite was not being held in storage but was still in course of transporta-

tion. * * * This dynamite was to be transferred to the Invernica for transportation to Montevideo. The original intention was that the vessel would sail on January 25th but her departure had been delayed from day to day for reasons not connected with the respondents. Until her cargo was loaded and she was ready to sail, the dynamite could not be placed on board because of the government regulations making it necessary to load the explosives at Gravesend Bay. Under all the circumstances, neither the railroad company nor the powder company nor the respondent Healing was at fault in permitting the dynamite to remain in the car for the six days which elapsed between the arrival of the car and its unloading.

"It is claimed that the respondent failed to comply with the requirements of the laws of the state of New Jersey and with the municipal regulations of Jersey City in respect to the storage of explosives. It is sufficient to say that the dynamite which exploded was addressed to Carlisle, Crocker & Co., Montevideo. It was a foreign shipment and as such was subject exclusively to the act of Congress approved March 4, 1910 (35 Stat. 1136, c. 321 (U. S. Comp. St. Supp. 1911, p. 1660)). That act (section 233) authorized the Interstate Commerce Commission to formulate regulations for the safe transportation of explosives

which should be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives by land. The Interstate Commerce Commission accordingly formulated and issued regulations governing the transportation of explosives in interstate and foreign commerce. We have no doubt that the dynamite in question was subject exclusively to the regulations of the Interstate Commerce Commission. When Congress has legislated upon a subject within its constitutional control, and has manifested its intention to deal therewith in full, the authority of local jurisdiction is necessarily excluded. See *Northern Pacific Railway Co. v. State of Washington*, 222 U. S. 370, 378, 32 Sup. Ct. 160, 56 L. Ed. 237."

In the instant case Buoy No. 1 was situated in Elliott Bay, located away from traffic, isolated from the hazard of fire and the element of human carelessness. It was a place safe, in the estimation of those familiar with the characteristics of high explosives to anchor this scow of nitro-glycerin. Exercising the discretion vested in the port warden, by the ordinance regulating ships carrying explosives in Seattle Harbor, his judgment was that this was a safe place for the anchorage of this scow. Record, pp. 43 to 48. The port warden testified that the City of Seattle had nothing to do with the scow or its contents, that it exercised no authority or control over it, that the city never had this ex-

plosive "in storage of any kind, shape or description." It merely permitted the scow to be moored at Buoy No. 1, a buoy established for that purpose. Record, p. 48.

Captain James S. Gibson, manager of the International Stevedoring Company, with twelve years experience as shipping master and twenty-one years experience as manager of stevedoring, testified:

Q. Now, Captain Gibson, from your experience as a shipping man in the handling of high explosives as the manager of this stevedoring concern, concerning the handling of dynamite of this character, would you say that Buoy No. 1 was a safe place?

A. Absolutely.

He further testified that it was the custom in 1915 in Seattle Harbor in transferring dynamite from vessels coastwise to vessels foreign to take it alongside away from the dock, either at buoys or at anchor in the harbor. Record, p. 66.

G. H. Adair, an explosive expert with twenty-four years practical experience, testified that he was familiar with the characteristics of the kind of explosives on the scow moored to Buoy No. 1; that he did not know of any safer place in Seattle Harbor than said buoy for the anchorage of vessels containing such explosives; that the Harrison Street dock was known as the powder dock and was used only for distributing small shipments that were necessary to be brought to the limits of Seattle for

consumption or for transfer to railroads; that there was no place in Seattle to store dynamite; that no foreign shipments handled by him were handled at the Harrison Street dock; that he would not even have considered mooring this dynamite to that dock. Record, p. 68.

John H. Wilman, who had been engaged in the manufacture, and, with the DuPont Powder Company, in the handling of this kind of explosive for twenty-eight years, testified that he was familiar with the kind of explosive on the scow; that it was very powerful and less sensitive than the ordinary dynamite of commerce; that the things to be guarded against in handling such explosives were fire and isolation from traffic; that there was no place in Seattle to store such quantities of dynamite as was on the scow; that to explode this kind of dynamite required fire and vibration. He was asked the following question:

“If you, Mr. Wilman, were asked—having the knowledge of these explosives and the experience you have had with them—to fix a place in the Bay for the mooring of vessels containing a high explosive of this kind and for their transfer, would you select Buoy No. 1 as a safe place?”

to which he answered:

“I would consider it such.”

“Q. Now, with your experience, would you consider for a moment the anchoring or tying up to a wharf in the city of Seattle the

quantity of dynamite that was on that scow—of the kind that was on it?

A. I would not consider it safe and particularly at that time.” Record, pp. 71, 72.

W. C. Dawson, who, as a steamship agent and operator, had handled high explosives for twenty years, and whose company, for the last ten years, had carried high explosives via San Francisco and Puget Sound continuously, testified that he was familiar with the location of Buoy No. 1 and the Harrison Street powder dock. He further testified:

“Q. What would you say as to the safety of Buoy No. 1 for the transferring of explosives such as are in issue here and as to the anchorage of boats or vessels carrying that explosive at that buoy?

A. I consider it a very proper and safe place for the exchange of explosives from one vessel to another.

Q. And to anchor boats?

A. Yes, sir.” Record, pp. 79, 80.

He further testified that he handled at the Harrison Street dock, only small shipments that were used locally—distributions that had no other terminals. Foreign shipments were transferred to another vessel or to a scow or barge if the connecting vessel was not here. This was done in Elliott Bay altogether in 1915.

While the municipality was not a party in the suit of “The Ingrid,” the principle of non-liability

is the same. The United States Circuit Court of Appeals for the Fourth Circuit, in the case of *Foard Co. v. State of Maryland*, 219 Fed. Rep. 827, said:

“Loading dynamite, gasoline, gunpowder, naphtha, and other inflammable or explosive substances is necessary to commerce and is not a nuisance. The *Ingrid* (D. C.) 195 Fed. 596, and authorities cited; *Ingrid v. Central Railroad Co.* (2d Circuit), 216 Fed. 72, 132 C. C. A. 316. * * *

“Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit. *Boehm v. Baltimore*, 61 Md. 265; *Lane v. City of Concord*, 70 N. H. 485, 49 Atl. 687, 85 Am. St. Rep. 643; *Hagerstown v. Klotz*, 93 Md. 437, 49 Atl. 836, 54 L. R. A. 940, 86 Am. St. Rep. 437; Note, *Van Cleef v. Chicago*, 23 L. R. A. (N. S.) 636; *Rogers v. City of Binghampton*, 186 N. Y.

595, 79 N. E. 1115; *City of Mansfield v. Bristol*, 76 Ohio St. 270, 81 N. E. 631, 10 L. R. A. (N. S.) 806, 118 Am. St. Rep. 852, 10 Ann. Cas. 767; *Salmon v. Kansas City*, 241 Mo. 14, 145 S. W. 16.

“Dynamite being a necessity and its transportation lawful, the community must bear such risk of damage from its transportation as cannot be avoided by due care. It is at least doubtful if any degree of care would result in finding an anchorage in the harbor, reasonably accessible, where the explosion of a cargo of dynamite would not be destructive. Remote-ness from habitations and business houses, smoothness of water, freedom from fogs, ease of transfer from car to ship, must all be considered, and due care and sound judgment exercised. The conclusion of the District Court is well supported that under the facts before it the city chose wisely, or at all events that the choice was made by a competent official, acting with due care and in good faith, and that the city incurred no liability.

“ * * * As loading dynamite is not a nuisance, but is universally recognized as a legitimate business, and the Jason was in the designated anchorage grounds, it follows from the views already expressed that her owner is not liable to those who happened to be on the ship for not changing his anchorage, whenever it was discovered that another ship was loading dynamite.”

From the record in the instant case there is but one conclusion, that is, that "under the facts before it the city chose wisely, or, at all events, that the choice was made by a competent official acting with due care and in good faith." In fact, this is not disputed. Therefore, the city incurred no liability.

IV.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THE CITY OF SEATTLE WAS LIABLE FOR THE ACT OF ITS OFFICER, THE PORT WARDEN, WHILE ENGAGED PURELY IN A GOVERNMENTAL FUNCTION.

The City of Seattle, while engaged in the regulating and controlling of the anchorage, moorage and landing of water craft, and their cargoes, in the harbor of the City of Seattle, through its port warden, was performing a purely governmental function and was not acting in a proprietary capacity. While the testimony shows that the City of Seattle, through its port warden, charged fees for the use of its buoys and piers, these fees were not such as to make a profit to the city. They were fees laid under the police power, and were purely regulatory. The testimony shows these buoys cost between Eleven and Twelve Thousand Dollars and that the income from Buoy No. 1 during the year 1915 averaged 51 cents a day and that the cost of its maintenance and upkeep was between \$150 and \$250 per year (Record, p. 48). Further the city

announced in its ordinance authorizing the regulation of the anchorage and moorage of vessels that it was acting purely within, and in aid of, its police power. The exercise of this power is never anything but governmental. It is never proprietary. The Supreme Court of the State of Washington, in passing upon this very ordinance, in the case of *The Kitsap County Transportation Company against the City of Seattle*, reported in 75 Wash. 673, at page 674, said:

“The sole question here for determination is whether or not the city, in exercising control over the harbor and waters of Elliott Bay in front of the City of Seattle, is liable in damages for failure of the port warden to enforce an ordinance which provided for the keeping of the harbor free from debris. * * * But the ordinance imposes a penalty on all who may thus transgress its provisions, and places the duty upon the port warden of enforcing it. If, then, the city is liable in damages, it must be by reason of the negligence of the port warden in failing to enforce the ordinance. The general rule is that a city is not civilly liable for neglect of duty on the part of its officers in respect to the enforcement of ordinances. In 4 Dillon, *Municipal Corporations* (5th ed.), § 1627, it is said:

‘Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation *is not bound to secure a per-*

fect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.'

In the present case, the negligence, if any, being that of the port warden in failing to exercise proper diligence in the enforcement of the ordinance, would not render the city liable to respond in damages."

The question of the liability of a city for acts of its officers acting in a governmental capacity, has many times been before the Supreme Court of Washington, and the rule, that a municipal corporation engaged in the performance of a public service, in which it has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants of the community, the officers act as public officers of the city, charged with a public service and for whose negligence or misconduct in the discharge of their official duty, no action will lie against the city unless expressly given, has been announced, and uniformly adhered to.

Lynch v. North Yakima, 37 Wash. 657.

Cunningham v. Seattle, 42 Wash. 134.

Russell v. Tacoma, 8 Wash. 156.

Howard v. Tacoma School District No. 10,
88 Wash. 167.

See *Foard v. Maryland*, 219 Fed. 827.

Generally, the courts of the United States will follow the construction placed upon the statutes of a state by the courts of last resort of such state.

Emerson-Brant Improvement Company v. Lawson, 237 Fed. 877.

We are not alone depending upon the construction placed upon the ordinance here in issue by the court of last resort in the State of Washington, for in *Foard v. Maryland*, 219 Fed. 827, at page 834, the Circuit Court of Appeals of the Fourth Circuit, announces and approves the same doctrine. At page 834 the court said:

“Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in *performing the governmental function of selecting a place for the loading of explosives from which it derives no profit.*” (Italics supplied.)

The same contention that was made in the

Foard case is made here, viz., that the port warden by designating Buoy No. 1, the place where the accident occurred, for the transshipment of dynamite, was negligent and created a nuisance. This contention is untenable. True, for the use of the buoy the port warden received \$1.00 per day but for designating it as a place for this scow to moor he received absolutely nothing. The port warden was simply exercising his discretion and judgment in selecting this place as a safe place for this scow to be while awaiting a vessel to carry its contents to its destination. This act was purely governmental in its nature.

That a municipal corporation is not liable for damages in the nonfeasance or omission to observe a law of its own, is well stated by Chief Justice Marshall in the case of *Fowle v. Common Council of Alexandria*, 3 Pet. 398, 7 L. Ed., 719, at page 723:

“Is a municipal corporation, established for the general purposes of government with limited legislative powers, liable for losses consequent on its having misconstrued the extent of its powers in granting a license which it had not authority to grant without taking that security for the conduct of the person obtaining the license which its own ordinances had been supposed to require, and which might protect those who transacted business with the person acting under the license? We find no case in which this principle has been affirmed.

That corporations are bound by their contracts is admitted; that money corporations, or those carrying on business for themselves, are liable for torts, is well settled; but that a legislative corporation, established as a part of the government of the country is liable for losses sustained by a nonfeasance, by an omission of the corporate body to observe a law of its own in which no penalty is provided, is a principle for which we can find no precedent. We are not prepared to make one in this case."

V.

THE COURT ERRED IN HOLDING AS A MATTER OF LAW THE CITY OF SEATTLE LIABLE FOR THE RESULTS OF AN EXPLOSION OF NITRO-GLYCERIN ANCHORED IN SEATTLE HARBOR AND OVER WHICH NITRO-GLYCERIN THE CITY COULD NOT AND DID NOT EXERCISE ANY CONTROL OR JURISDICTION, IT BEING IN TRANSIT IN FOREIGN COMMERCE.

It is undisputed that this dynamite that exploded on the 30th day of May, 1915, was in foreign commerce. It was shipped from San Francisco to Vladivostok, Russia, to be transferred from the coastwise vessel bringing it to Seattle to some ship sailing for Vladivostok. For some reason utterly beyond the control of the City of Seattle the Maru on which it was to have been taken did not take

it. It then became necessary for it to remain in Seattle harbor until a vessel carrying powder and sailing for Vladivostok arrived. The City of Seattle could not control the steamships engaged in foreign commerce. It had no power to require any ship or ships, or their masters, to take this dynamite. It had no power to prohibit the shipping of dynamite from San Francisco by way of Seattle, to Vladivostok. This dynamite, while awaiting a vessel to carry it to its destination, must remain somewhere. The agents of the owners of this dynamite applied to the port warden for a place in Seattle harbor where it might be moored pending the arrival of a vessel for its shipment. He designated a buoy farthest from the railroads, piers, streets, habitations, and away from the danger of fire and the element of human carelessness. Record, pp. 46, 47, 48. In selecting this place he exercised his best judgment, a judgment confirmed by the witnesses, Captain J. S. Gibson, G. H. Adair, W. H. Wilman and W. C. Dawson, all men having a quarter of century experience in the handling of high explosives. But counsel for defendant in error say that the city council fixed by ordinance the Harrison Street powder dock as the only place where vessels carrying dynamite could be moored. We have discussed this contention under point II and invite the consideration of the discussion under that point in answer to that contention. By Sections 4278 R. S. and 4279 R. S. the Congress of the United States has assumed

control and regulation of the transportation of explosives, both in interstate and foreign commerce. Having evinced its intention to control this particular commodity in commerce the jurisdiction of it is at once taken away from the states and their political subdivisions.

Southern Ry. Co. v. U. S., 222 U. S. 20; 32 Sup. Ct. 2, 56 L. Ed. 72.

*Northern Pacific Ry. Co. v. State of Wash-
tion*, 222 U. S. 370; 32 Sup. Ct. 160, 56 L. Ed. 237.

Southern Ry. Co. v. Reid, 222 U. S. 424; 32 Sup. Ct. 140, 56 L. Ed. (U. S.) 1079.

The only power or authority over explosives in commerce granted to the states or their political subdivisions is given by Section 4280 R. S. This latter section provides:

“The two preceding sections (4278, 4279) shall not be so construed as to prevent any * * city * * within the United States from regulating or from prohibiting the traffic in or transportation of those substances, between persons or places lying or being within their respective territorial limits, or from prohibiting the introduction thereof into such limits, for sale, use, or consumption therein.”

No power is, by this section, reserved to the city to say to the owner or the master of a vessel engaged in foreign or interstate commerce, having cargo of explosives,—“You shall not enter the har-

bor of Seattle with your ship and cargo." Nor is the power reserved to refuse the right to anchor in Elliott Bay. No power is reserved to prohibit the introduction of explosives into the limits of the city except for sale, use or consumption therein. No power is reserved to prevent the introduction of explosives into the limits of the city in interstate or foreign commerce. To sustain the contention that the city had such powers would be to overrule the decisions of the Supreme Court of the United States beginning with *Gibbon v. Ogden*, 9 Wheat. 67, to the present time, as well as to repeal many acts of Congress. The mere statement of the situation furnishes an answer to any such contention. The only power reserved to cities by Congress is the power to regulate or prohibit the movement of explosives from person to person or place to place, and their sale, use and consumption therein, after they have been commingled with the property of the state and have ceased their character as articles of interstate or foreign commerce.

VI.

THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO DISMISS.

Without repeating, the arguments preceding this point are apposite, and, in considering this point, we ask the court to consider the arguments heretofore made as though repeated.

In conclusion we submit that the demurrer of the plaintiff in error should have been sustained

by the court. In any event, upon the record in the case, the motion of the City of Seattle to dismiss the action should have been granted by the lower court. The judgment should be reversed, and the action dismissed.

Respectfully submitted,

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Attorneys for Plaintiff in Error.

No. 3112

**United States
Circuit Court of Appeals**

FOR THE NINTH CIRCUIT

CITY OF SEATTLE, a Municipal Corporation,
Plaintiff in Error,

vs.

**LLOYDS PLATE GLASS INSURANCE COMPANY, a Cor-
poration,**
Defendant in Error.

**Upon Writ of Error to the United States District Court for
the Western District of Washington,
Northern Division.**

BRIEF OF DEFENDANT IN ERROR

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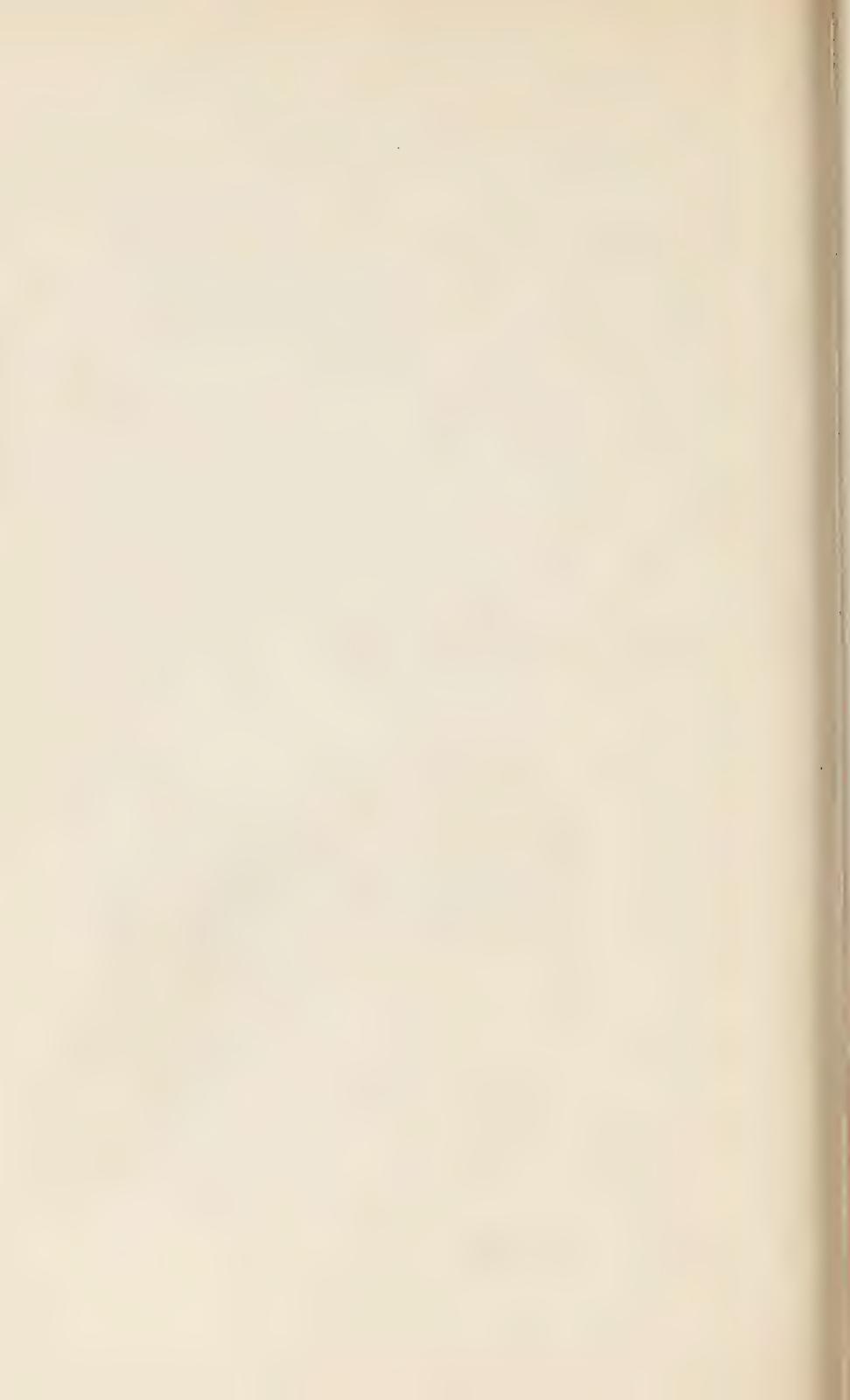
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STATEMENT.

We are not satisfied with the statement made in the brief of the plaintiff in error, for the reason that it contains assertions of alleged facts concerning which there is no testimony in the record,

and omits facts vital to a correct determination of the case. We, therefore, make the following statement:

On March 1, 1915, the City Council of the City of Seattle passed Ordinance No. 34379, which, among other things, provided:

“Section 39. The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, *and for use exclusively for the handling of powder, dynamite and other like explosives*, and as a place for *vessels* carrying as cargo, or part cargo, *such explosives*. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden.” (Italics ours.) (Record, p. 58.)

This ordinance was approved by the Mayor, published on March 12th, and thereupon became a valid ordinance of the city. Some time thereafter, the Hercules Powder Company shipped from San Francisco to Seattle, on the Steamer “F. S. Loop,” fifteen tons of dynamite. Just when the dynamite arrived in Seattle, the evidence does not disclose. At any rate, the dynamite was, some time after its arrival in Seattle, transferred to a barge chartered by the Lillieo Launch & Tug Boat Company, and on May 14th the barge containing this dynamite was moored to Buoy No. 1. This buoy was owned and maintained by the City of Seattle, and was located within the city limits of Seattle and in that part of the harbor of the City of Seattle known and designated as the “Elliott Bay Anchorage.” On the following morning, the Port Warden of the

City of Seattle, in consideration of the payment of a fee of one dollar per day, issued a permit to the Lillico Launch & Tug Boat Company to moor this barge to Buoy No. 1. At the time of the issuance of this permit, he knew that the scow had on board the fifteen tons of dynamite. (Record, p. 44.)

The Port Warden testified that he was *informed* that this dynamite was to be transported to Vladivostok, Russia, by a Japanese steamship, but that such steamship sailed from Seattle about a week after the dynamite had been transferred from the "Loop" to the scow. (Record, p. 48.) Whether the Japanese steamship sailed before the barge was moored to Buoy No. 1, the evidence does not disclose. The Port Warden further testified that for some reason the steamship could not take the dynamite, and that after its failure to transport the dynamite, it was arranged that the Steamship "Robert Dollar," which was to sail on May 31st, should carry it. However that may be, the fact is that the barge with the dynamite on board was moored to Buoy No. 1 from May 14th until about two o'clock on the morning of May 30th, at which time the dynamite exploded.

The force of the explosion was so great that windows were broken in Tacoma, Hillman City and in Everett (Record, pp. 34, 35), and a scow containing 250 tons of coal which had been moored alongside the barge of dynamite on May 28th or 29th, was turned over. (Record, p. 45. *Jolivet v.*

City of Seattle, 226 Fed. 963.) Many thousand dollars worth of plate glass was broken in Seattle. Indeed, so much glass was broken that the glass market became demoralized and it was not possible to replace all the glass until December, 1915. The Port Warden testified that he saw glass on the street in the Pike Street district and all the way down until he got to Pier 1. (Record, p. 46.) Reference to the map attached to the bill of exceptions will disclose that the broken glass seen by the Port Warden must have covered an area at least a mile and a half long.

At the time of the explosion, the Lloyds Plate Glass Insurance Company, a New York corporation, and the Globe Indemnity Company, also a New York corporation, had in force policies of insurance on various windows in the down-town district of the City of Seattle. After the explosion, these two insurance companies replaced the broken glass covered by the policies issued by them, and thereafter filed claims with the City of Seattle, as provided by the City Charter, for the damage which they had sustained by reason of this explosion. The City Council rejected these claims. The Globe Indemnity Company then assigned its cause of action to the defendant in error, and thereupon suit was brought. The case was tried before the Honorable E. E. Cushman sitting without a jury, and at the conclusion of the testimony he rendered an oral opinion holding the City liable. (Record, p. 83.)

ARGUMENT.

The Claims Filed Were Sufficient.

The first contention made by the City is that the claims filed by the insurance companies with the City of Seattle were erroneously admitted in evidence, in that the claims were not filed and verified by the property owners but by the insurance companies. At the outset, let us say that we agree that Section 29 of the City Charter and Section 7995 of Remington & Ballinger's Code are the applicable provisions of law. We also agree that the filing of a claim is a condition precedent to the right to maintain a suit against the City.

Collins v. Spokane, 64 Wash. 153, 157.

The real question for solution here, however, is: What is the meaning of the word "claimant" as used in the charter provision and statute? Counsel for the City insists that the word "claimant" means the person who sustained damage to his property, and that in this case the only person who could have sustained any damage to his property was the owner of the glass which was broken. We assert that under the circumstances of this case the owner of the cause of action is the claimant within the meaning of the law, rather than one who has no interest whatsoever in such cause of action; and that the only persons or corporations who had a cause of action against the City for the loss here sought to be recovered were the insurance

companies. It will be remembered that the explosion occurred at two o'clock on Sunday morning. The glass covered by the insurance policies was, for the most part, the glass fronts of the stores in the business portion of the City of Seattle. That this is true is readily apparent, not only from the testimony of Mr. Paysse, but from an examination of the claims themselves. For instance, in one of the claims filed by the Globe Indemnity Company, the glass broken, as shown by the bill attached to the claim, was as follows:

“One plate 88x105
 One plate 85x120
 One plate 63x80½
 One plate 80½x102”

These particular windows were situated in the store building of Frank McDermott, at 1612-14-16 Third Avenue. (Record, pp. 98, 105.) Now, it is obvious that these windows had to be replaced as soon as possible. The insurance company had the right, under the terms of its policy, either to pay the value of the glass broken or replace the windows themselves. The insurance company exercised its option and replaced the glass. When the insurance company replaced the glass, what claim did the owner of the glass have against the City of Seattle or any one else? And will it be argued that the property owner, in defiance of the provision of the insurance policy which gave to the insurance company the option either to pay the value of or replace the glass, should him-

self have replaced the glass and then filed a claim with the City? If the property owner pursued such a course, he could have had no recourse against the insurance company. Moreover, if these windows were not replaced promptly, abundant opportunity would have been given to thieves to steal the merchandise from the stores. The property owner would, therefore, desire immediate replacement. Suppose the glass was replaced on Sunday by the insurance company, how then could the property owner have filed a claim with the City of Seattle on Monday? We therefore think it apparent that the insurance companies, upon the replacement of the glass, became the real parties in interest.

In *Fireman's Fund Insurance Co. v. Oregon-Washington R. R. & Nav. Co.*, 58 Wash. 332, the Supreme Court of the State of Washington held that when it was shown that an insurance company had paid the amount of its policy in part settlement of a loss and the *tort feasor* had settled with the assured for the balance, the insurance company was the entire owner of the liability remaining. It is certain that this is equivalent to a holding that the only party in interest when an insurance company has fully paid the loss, is the insurance company itself.

Again, in *Palmer v. Oregon-Washington R. R. & Nav. Co.*, 208 Fed. 666, the court held that under the statute of the State of Washington an insurance company is, upon payment of a policy, subro-

gated by operation of law to the rights of the assured; and that in such case it is the real party in interest and can maintain an action in its own name against a third person whose act was the cause of the loss.

The defendant in error and the Globe Indemnity Company, upon the replacement of the glass, became then the entire owners of the liability against the City. They were the real parties in interest, and therefore the only persons who owned or could assert a claim. To contend otherwise is to assert an absurdity. Suppose, for instance, that the owner of property damaged dies within the thirty-day period. Then, under the doctrine now advanced by the City, the executor or administrator of the estate of the property owner so damaged could not file a claim against the City. The executor or administrator would not, under such circumstances, be the claimant within the City's definition of that word, for neither the executor nor the administrator would be the party immediately suffering the damage. Now, a subrogee, or an insurance company, stands in the same position as such an executor or administrator. An insurance company, like the executor or administrator, steps into the shoes of the original owner of the claim by operation of law as well as by contract, and certainly there is no rule of public policy to be subserved in depriving it or him of the rights thus acquired.

It is true that the City should be protected against fraudulent claims and given a fair oppor-

tunity to investigate or settle the claims made against it.

In *Hase v. Seattle*, 51 Wash. 174, 180, it is said that a provision requiring a claimant to give a present residence, might be held to be reasonable, for the reason that it would give the City authorities an opportunity to see the claimant, to talk with him, to ascertain something of his appearance, or to make advances toward settlement of his claim if deemed expedient; but that to require anything further would be unnecessary and savor somewhat of inquisitiveness.

In *James v. Seattle*, 68 Wash. 359, it appears that a Mrs. James was injured by reason of a defect in a sidewalk. She verified and presented a claim to the City. The City in that case contended that in view of the fact that the Supreme Court of the State of Washington had held in the case of *Hawkins v. Front St. Cable R. Co.*, 3 Wash. 592, that the husband was a necessary party plaintiff in an action brought to recover for personal injuries to his wife, a claim verified by the wife alone was insufficient. The Court, however, held that the wife was a proper party to such action. Continuing, the Court said:

“Being a proper party, she is also a claimant; and since the charter does not require all the claimants to join in a claim, or specify which claimant shall verify the claim where there is more than one such claimant, it would seem to follow that both or either might properly verify it; and such has heretofore been the ruling of this court.”

In *Falldin v. Seattle*, 50 Wash. 561, the Court, in discussing the sufficiency of a claim filed with the City of Seattle under the same charter provision now under discussion said:

“This court has uniformly held that requirements of this kind must be reasonable, and that a reasonable compliance with such requirements was all that could be demanded.”

See also:

Walters v. Seattle, 97 Wash. 657, 663.

Now, the claims filed in this case set forth everything which it was reasonable or necessary for the City to know in order that it might be protected against a fraudulent claim or to ascertain whether it desired to make advances towards settlement of the claims. There was set forth the cause of the breaking of the glass, the names of the owners of the glass, the place where the glass was situated, the number of windows broken, the value of the glass less salvage, and the residence for one year last past of each of the insurance companies. The claims also recite that the insurance companies replaced the glass under the provisions of the policies, and were therefore subrogated to the rights of the assured. In addition to that, the Globe Indemnity Company attached to the claims filed by it the bills of the glass companies replacing the glass, which bills set forth the description and size of the glass replaced, the value thereof, the cost of labor in replacing the glass and the amount of the salvage. What more could the City ask?

How could it be better protected? Did it not have all the opportunity in the world to ascertain whether or not these claims were fraudulent, or to make advances toward settlement if it desired? Moreover, the very fact that the insurance companies did, themselves, replace this glass would indicate to an ordinary man that the claims were not fraudulent, for insurance companies are not in the habit of paying fraudulent claims. Nor do we think it can be fairly argued that the insurance companies would conspire with the property owners to pay fraudulent claims for the purpose of subsequently suing the City for reimbursement.

The case of *Haynes v. Seattle*, 83 Wash. 51, cited by counsel for plaintiff in error, is not in point. Dora Haynes, the plaintiff in that case, was of full age when the accident happened. Her father verified and filed with the City Council a claim. No damage, of course, had been sustained by him. He was not the real party in interest. He was not even a proper party. He had, in fact, no legal interest whatever in the cause of action. He had no more right to verify and file a claim in behalf of Dora Haynes than anyone else.

The City, in Issuing a Permit for the Storage of the Dynamite at Buoy No. 1, Violated Its Own Ordinance, thereby Creating a Nuisance Per Se, and is Liable in Damages therefor.

Our first contention is, that the City, having for a consideration issued a permit to the agent of the

owner of the dynamite to store this dynamite on a barge moored to Buoy No. 1, violated Ordinance No. 34379 of the ordinances of the City of Seattle, and that the violation of this ordinance constituted a nuisance for which the City is liable in damages.

The Ordinance Requires That Dynamite Shall Be Stored at the Powder Dock.

An elaborate argument is made by counsel for the City to the effect that the trial judge erroneously construed this ordinance. The trial court's construction, however, is the correct one, as an analysis of the ordinance will demonstrate. Section 39 provides:

“The Harrison Street municipal pier is hereby designated for use *temporarily* as a powder dock, and for use *exclusively* for the handling of powder, *dynamite* and other *like explosives*, and *as a place* for vessels carrying as cargo, or part cargo, *such explosives*. Any vessel shall be allowed to lie at said pier only after a written permit shall have been issued by the port warden.” (Italics ours.)

This section says as plainly as the English language can make it, that the Harrison Street pier is to be used exclusively for the handling of dynamite and other like explosives, and as a place for vessels carrying as cargo or part cargo dynamite and like explosives. Counsel for the City, however, seek to interpolate certain words into Section 39 so that the Harrison Street pier should be construed as only one of the places where dynamite

might be stored or handled. In support of this construction, an elaborate analysis is made of the whole ordinance. Some of the sections analyzed are not material, others have been misinterpreted.

Sections 1, 2 and 4 we pass by, as they have no bearing on this case. It is insisted, however, that Section 7 of the ordinance (Record, p. 51) does have a most vital bearing upon the case. An examination of that section, however, will readily disclose that counsel has misinterpreted it and that properly interpreted it is wholly immaterial here. The first part of Section 7 provides that eight different bodies of water in Seattle Harbor shall be known as "fairway," and that they shall not be obstructed in any manner whereby navigation may be endangered or impaired. Continuing, Section 7 provides:

"All navigable waters in the *projection of public streets, lying on the landward side of the outer harbor line* shall be fairway. It shall be unlawful for the master, or other person in charge of any vessel, to anchor, tie or make fast such vessel in any *such fairway* for a longer period of time than reasonably sufficient to load or unload the same, except that the port warden may, in his discretion, grant any permit for the use of any *such fairway* for a longer period of time whenever in his judgment such use will not interfere with the use of the fairway by any other vessel, but only upon the payment of the anchorage charges herein provided for." (Italics ours.)

Now, it is asserted in the brief of plaintiff in

error that this provision of Section 7 gives to the Port Warden the right to permit any vessel to lie at anchor in *any* fairway for such length of time as the Port Warden may prescribe. Obviously, however, such is not the case. The only discretion given to the Port Warden is to permit vessels to lie at anchor in only a certain limited number of fairways, that is, those fairways which are defined as being the navigable waters in projection of public streets and lying to the landward of the outer harbor line. For instance, the Port Warden has no power to grant a permit for a vessel to lie at anchor in the East and West Waterways. The East and West Waterways are defined by Section 7 as being fairways, but the Port Warden may not permit a vessel to anchor therein. Again, all of Elliott Bay lying east of a straight line drawn from Alki Point to West Point is denominated as fairway. There is reserved, however, a certain portion of this territory for anchorage grounds, and these anchorage grounds are not considered a part of what may be denominated the Elliott Bay fairway. The Port Warden does have the right to grant to certain vessels the right to anchor in Elliott Bay anchorage, but he has absolutely no right to grant any vessel the right to anchor for a single moment in Elliott Bay fairway. It will thus readily be seen that the wide and sweeping discretion which counsel for the City claims for the Port Warden is not possessed by him. As a matter of fact, the ordinance demonstrates that he

has a most limited discretion, and that his acts are rigidly defined and limited by the ordinance.

It is plain that the last paragraph of Section 7 above quoted has nothing to do with buoys, for there are no buoys in the fairways therein described. Nor is there anything in the language of the entire section which, even by inference, would permit dynamite to be stored in any of the bodies of water described in said section.

Sections 16 and 19 we pass by, as they are likewise immaterial.

Stress is laid upon Section 33. There is nothing in that section, however, which is in any way inconsistent with the trial court's construction of Section 39. Section 33 simply prescribes the conditions under which a vessel *entitled to moor to a buoy* may do so. It does *not* provide that every vessel may be attached to a buoy. It does *not* determine what vessels may be attached to a buoy. The argument which we make relative to various subdivisions of Section 38 applies with like force to Section 33.

We come, then, to Section 38 of the ordinance. In the brief of the City it is said that in construing an ordinance, the court should give effect to all of its provisions and that nothing should be added to or eliminated from the language of the ordinance, unless necessary to give sense to that which remains. Sections 38 and 39, therefore, must be construed together, and no change must be made in the wording of Section 39 unless absolutely necessary to

make it intelligible. If Sections 38 and 39 are construed together, it will not be necessary to interpolate any words in Section 39 in order to make that section perfectly clear.

We point out again that Section 39 provides that the Harrison Street municipal pier is designated for the time being as the powder dock, and that such pier is the only place where dynamite and like explosives may be handled or stored. Explosives other than dynamite and its like need not, however, be *handled* at the powder dock. They may be handled there, or, as we shall subsequently show, they may be transferred direct to a vessel on the day of its departure, and when the receiving vessel is lying at anchor in the harbor or moored to a buoy. Section 39, however, is the section, and the only one, which appoints a place for the handling and storing of dynamite. Section 38 does not attempt to appoint a place where dynamite may be handled or stored. Some of the subdivisions therein do relate to vessels carrying dynamite, but they do not prescribe *where such vessels may lie*.

With this distinction in mind, let us examine the subdivisions of Section 38 relied upon by counsel for the City. Subdivision 3 of Section 38 (Record, p. 55) provides in substance that "every vessel lying at any powder dock or at anchor within Seattle harbor which has a cargo or part cargo of dynamite, ignition caps, blasting or sporting powder, or other high explosives, or explosives in any

form, shall" display certain signals. It will be noted that this subdivision is a provision relating to all vessels carrying explosives of any kind. It divides explosives into two kinds: (1) dynamite, ignition caps, blasting or sporting powder or other high explosives, and (2) explosives in any form. It then provides that all vessels, irrespective of the kinds of explosives on board, must display certain signals. It recognizes that these vessels will lie at different places, namely, that vessels carrying dynamite and explosives of like character will lie at the powder dock, and that vessels which carry explosives other than high explosives may lie at anchor in the bay. Vessels, however, carrying either kind of explosives must display the required signals. So construed, and this is the only proper construction of the subdivision, it is in entire harmony with Section 39, and words need not be interpolated in the last named section in order to make it intelligible. If it be thought that the word "any," preceding the words "powder dock" in the first line of said subdivision throws some doubt upon this construction, we point out that Section 39 appoints the Harrison Street municipal pier as the powder dock only temporarily. It was in contemplation, perhaps, that the powder dock would be changed later to some other pier either constructed or to be constructed. If such change were made, all the Council would have to do would be to amend Section 39, but would not have to change the language of Section 38. It is also very

probable that the Council had in mind that eventually there might be more than one pier in the City of Seattle designated as a powder dock. One thing, however, is certain; and that is, that on May 30, 1915, there was but one place designated as a powder dock.

Reliance is placed upon Subdivision 4 of Section 38 (Record, p. 55). That section provides that no person shall, on any pier or other structure except on the powder dock or on powder boats, store or have on hand for sale or sell or keep any powder, ignition caps, dynamite or other like explosives, either by day or night. The contention in regard to this section is that it shows that dynamite may be stored on powder boats, and it is assumed that powder boats carrying dynamite may lie at anchor in the harbor or be moored to a city buoy. An examination of the ordinance from beginning to end will disclose, however, that not once is any mention made of a powder boat being anchored in the harbor or moored to a buoy. The trial court, construing this subdivision, said:

“Section 39 requiring powder boats to be kept at the Powder Dock—in order to cover the tow powder boats here mentioned beside the Powder Dock—it would be assumed that the powder boats in case the explosive was dynamite would be at the Powder Dock.” (Record, pp. 85, 86.)

Counsel's misconstruction of this subdivision arises from his refusal to take into account that the ordinance makes a distinction between dyna-

mite and like explosives and explosives other than dynamite and its like. It is true that powder boats have the right to transfer ordinary explosives direct to vessels on the day of departure, and when such explosives are transferred the receiving vessel need not lie at the powder dock. Powder boats may not, however, transfer dynamite and its like to vessels lying at anchor in the harbor or moored to buoys, and powder boats may not, under any circumstances, be moored or anchored to a city buoy, and certainly not for seventeen days when containing a cargo of dynamite.

The trial court's construction of this subdivision and its kindred subdivisions is borne out by Subdivision 10 of Section 38, which provides that smoking is prohibited (1) on a powder dock, (2) on every vessel lying thereat, (3) on every vessel to which explosives are being transferred and on the powder boat engaged in such transfer. This subdivision recognizes the right of powder boats to transfer *ordinary* explosives to a vessel on the day of the vessel's departure, and that in such case the receiving vessel need not lie at the powder dock. Smoking is prohibited, both upon the powder boat transferring the explosive, and on the vessel receiving the same. Protection against smoking on vessels carrying dynamite and like explosives is provided for by the first half of the subdivision, which recites that smoking is absolutely prohibited on the powder dock and on the vessels lying thereat.

Counsel's chief contention, however, is that Subdivision 11 of Section 38 (Record, p. 57) permits the storage of dynamite on board a boat lying at a city buoy. What we have just said refutes this idea, but at the risk of tediousness we will re-state our proposition. Subdivision 11 provides that every vessel carrying a cargo of explosives in any form while lying at anchor or at a city buoy or alongside the powder dock, shall at all times have on board a competent crew and shall display the required signals and be ready to move when emergency requires. We are of the opinion that the phrase "explosives in any form" includes dynamite, but it does not follow that this subdivision gives the right to a vessel carrying a cargo of dynamite to lie at anchor in the harbor or to be attached to a city buoy. The purpose of this subdivision is to require all boats carrying explosives of any kind to have a crew on board, etc. The proper construction of this subdivision, then, is that those vessels which have on board explosives other than dynamite and its like may lie at a buoy or at anchor in the harbor. They must, however, observe certain precautions. Those vessels which have on board dynamite and its like must lie at the powder dock, but at the same time they must observe the same precautions. In other words, it is not the purpose of this subdivision to designate the places at which boats carrying the different kinds of explosives may lie, but to require that boats having on board explosives must carry a sufficient crew,

display the required signals and be ready to move when emergency requires.

The ordinance, therefore, is clear and unambiguous. It prohibits the handling and storing of dynamite at any place other than at the Harrison Street municipal pier. There is, therefore, no occasion for the invocation of the rule that when a law is ambiguous the long settled and uniform construction of it by those encharged with its enforcement is entitled to weight. Moreover, we do not think that rule has any application here. The ordinance was passed on March 12, 1915, and two months and two days later the Port Warden issued the permit to the Lillico Launch & Tug Boat Company. This does not constitute a long settled and uniform construction of the law by those empowered to enforce it. The cases cited by counsel, and all others which can be found, will demonstrate that in order to have such construction entitled to any weight, it must have been of long continuance. For instance, in the case of *United States v. McDaniel*, 7 Peters 1, the law had received a uniform construction over a period of twenty-five years.

In *Edwards, Lessee, v. Darby*, 12 Wheat. 206, the statute there under consideration had received a uniform construction for over thirty-five years, and, in addition, that construction had been especially approved by the legislature of North Carolina.

In *Brown v. United States*, 113 U. S. 568, a uni-

form construction had been placed upon the Act of Congress, there in question, for more than twenty years, and such construction was placed thereon by the President and the Navy Department.

Furthermore, in all cases in which this rule has been invoked, the officer in charge of the enforcement of the law has been either the President of the United States or one of the great Cabinet Ministers of the Federal Government, or one of the heads of the departments of a State. These officers, it is true, do devise policies and promulgate rules. They are necessarily invested with a wide discretion. The construction placed by such officers over a long period of time upon the law under which they are acting may be entitled to considerable weight, but it is a far cry from officers of such dignity to a town marshal or a port warden. Counsel for plaintiff in error, it seems to us, is going as far afield to place an erroneous construction on this ordinance as was the Roman lawyer who, having been employed to obtain the possession of three goats, said nothing concerning them in his argument, but dilated on "*Cannas Mithridaticumque bellum et periuria Punici furoris et Sullas Mariosque Muciosque.*" (Martial, Book VI, p. 269.)

The Storage of Explosives at a Place Forbidden by Ordinance Creates a Nuisance Per Se.

We assert, and we do not think the City will deny, that when a dangerous instrumentality such as dynamite is kept or stored at a place or in a

manner forbidden by statute or ordinance, a nuisance *per se* is created, for the proximate results of which the maintainer is responsible.

In *Hazard Powder Co. v. Volger*, 58 Fed. 152, 156, the court said:

“The maintenance by the defendant of a powder magazine, containing a large quantity of powder, within the city limits, *in violation of the city ordinance*, was a nuisance which rendered the defendant liable for the injury resulting to the plaintiff from its explosion. It is no defense to such an action that the magazine was properly constructed and the powder carefully stored therein, and that the explosion was due to no personal negligence of the defendant or its agents. It is liable for the injuries resulting from its explosion from any cause, because *its location under the ordinance made it a nuisance.*” (Italics ours.)

In *Laflin-Rand Powder Co. v. Tearney*, 131 Ill. 322, the Supreme Court of Illinois said:

“The ordinance absolutely prohibited any powder magazine from being kept within the town, unless the lot upon which it was located should be of a certain size. The defendant kept its magazine within the town upon a smaller lot than the law required. Its magazine was in the town, in violation of the law. The keeping of gunpowder in the town was an illegal act. ‘If an illegal act be done, the party doing or causing the act to be done is responsible for all consequences resulting from the act.’ *Burton v. McClellan*, 2 Seam. 434. The cases referred to by counsel as holding a contrary doctrine have no application here. In those cases it is held that, where the plaintiff’s right of recovery depends upon his own exercise of due care, as well as upon the defend-

ant's negligence, the failure of the defendant to comply with some statutory requirement, such as ringing a bell, or blowing a whistle, or erecting a sign-board, will not of itself authorize a recovery, in the absence of such care on the part of the plaintiff. There the injury is attributable to the plaintiff's want of ordinary care, and the defendant's neglect of a statutory requirement cannot be set up as an excuse. Here there is no question of the exercise of care by the plaintiff, nor is it a mere matter of non-feasance on the part of the defendant. In keeping a powder magazine in the town without complying with the condition named in the ordinance, the defendant was guilty of malfeasance."

Of the innumerable other cases which have sustained this doctrine, we cite only:

Texas Co. v. Fisk, 129 S. W. 188.

Kelsey v. Chicago R. R. Co., 81 N. E. 522.

Blanc v. Murray, 36 La. Ann. 162.

McAndrews v. Collierd, 42 N. J. Law 189.

Cameron v. Kenyon-Connell Commercial Co.,
22 Mont. 312.

Flannagan v. Bloomington, 156 Ill. App. 162.

Ricker v. McDonald, 85 N. Y. Sup. 825.

Walker v. City of New York, 95 N. Y. Sup.
121.

It is Immaterial that the City did not Own either the Barge or the Dynamite.

It is argued that the City itself did not store the dynamite at Buoy No. 1, and therefore is not liable. (Appellant's Brief, pp. 44, 45.) Now, it is true that mere knowledge on the part of the City that a nuisance was being maintained would not render

it liable; but the complaint alleges, and the proof shows, that the City for a consideration issued a permit to Lillico Company to moor its barge to the City's buoy and that at the time of the issuance of such permit the Port Warden knew that the barge had on board fifteen tons of dynamite. Under these facts, a case of participation in the maintenance of a nuisance is made out against the City.

In *Kolb v. Mayor of Knoxville*, 111 Tenn. 311, the court said:

"It is insisted that the city is not liable because the refuse stuff poured into the sewer above mentioned, was dumped there, not by the city itself, but by certain persons whom the city had licensed to use the sewer in that way. *The city cannot escape in this manner.* If it licensed its property to be used for the purpose indicated, that is, for the dumping of night soil into it, it must see to it that those who use it take such precautions that the use will not be made a nuisance. This is bound to be so on principle. *The city itself could not maintain such a nuisance*, and if it could not, *it clearly has no power to authorize other people to do the same thing.* See Wood on Nuisances, vol. 1, p. 666, vol. 2, p. 1000; 2 Dillon on Mun. Corp. §1048, note." (Italics ours.)

See also:

Cohen v. New York, 113 N. Y. 532.

Speir v. Brooklyn, 18 N. Y. Sup. 170. (Affirmed, 139 N. Y. 6.)

McDonald v. City of Newark, 42 N. J. Eq. 136.

Fitzgerald v. Town of Sharon, 143 Iowa 730.

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Fitzgerald v. Town of Sharon, 143 Iowa 730.

Nor is it material that the City itself did not own this dynamite. A *tort feasor* is not excused because he does not own the instrument causing the tort.

In *Pinson v. Young*, 164 Pac. 1102, it is said:

“Moreover, if it were established that the powder company knowingly aided or abetted Young Bros. in the maintaining of this dangerous nuisance, the company would not be relieved of liability, *even if it did not own the powder* wrongfully or negligently stored in disregard of the public safety or in disregard of the city ordinance. The mere question of ownership of the powder was not primarily important.” (Italics ours.)

And so far as this question is concerned, a municipal corporation is subject to the same liability as any other *tort feasor*.

It is No Defense to this Action that the City in Maintaining Buoy No. 1 was Acting in its Governmental Capacity.

The City contends that in maintaining Buoy No. 1 and in issuing a permit, for a consideration, to the agent of the owner of dynamite to store the dynamite at Buoy No. 1, the City was acting in its governmental capacity, and that for acts of negligence in so doing it is not responsible. The trouble with this contention is, that in the first place the City was not acting in its governmental capacity, but in its private proprietary capacity, and, second, that even if it were acting in its governmental capacity, the acts charged against the City, viewed

from the angle now under discussion, were not acts of negligence, but acts of positive wrongdoing. We shall not discuss at this point in which capacity the City was acting, but shall assume that the City was acting in its governmental capacity. The acts charged against the City, however, are not mere acts of non-feasance. They are affirmative acts of wrongdoing. The complaint alleges and the proof shows that the City owned and maintained Buoy No. 1; that this buoy was under the supervision and control of the City and of the Port Warden; that the Port Warden, knowing that the barge had on board fifteen tons of dynamite, nevertheless issued a permit to the Lillieo Company to store this dynamite at Buoy No. 1; that by virtue of this permit, the dynamite was stored at Buoy No. 1 for a period of sixteen or seventeen days, and that the storage of this dynamite at the place designated by the Port Warden constituted a violation of the ordinances of the city.

It is to be noted, therefore, that the cause of action now under consideration is not based upon the *failure* to *pass* an ordinance or upon the mere *failure* of the city to *enforce* an ordinance. The gist of this cause of action, therefore, is not negligence, but nuisance. Now, we have demonstrated in the preceding portion of this brief that the act of the City in permitting the storage of the dynamite was a nuisance. But a municipal corporation, acting in any capacity, has no more right to create or maintain or participate in the creation or main-

tenance of a nuisance than has a private individual or corporation; and if a city does create or maintain or participate in the creation or maintenance of a nuisance, it is liable to the same extent and in the same manner as a private individual or corporation.

Such was the law in the time of Lord Hale. In Hargrave's Law Tracts, *pars secundo*, p. 85, it is said:

“And it would be impossible for the king to license the building of a new wharf or quay, whereof there are a thousand instances, if *ipso facto* it were a common nuisance, because it straitens the port, *for the king cannot license a common nuisance.*”

From that day forth the authorities on this question have spoken with but one voice.

In *Bernstein v. City of Milwaukee*, 158 Wis. 576, 149 N. W. 382, it appears that a child was injured in using a certain apparatus owned and maintained by the city in a playground. The court in that case held that the city in maintaining a playground was performing a governmental duty. Continuing, it said:

“It has been decided many times in this court that negligence in the performance of a governmental function by the officers or agents of a municipality does not give a right of action. (Citing authorities.)

The exception to this rule is that a municipality may *not maintain a public nuisance*, even when it is performing a governmental duty. *Hughes v. Fond du Lac*, 73 Wis. 380, 41 N. W. 407; *Gilluly v. Madison*, 63 Wis. 518,

24 N. W. 137, 53 Am. Rep. 299; *Schroeder v. Baraboo*, 93 Wis. 95, 67 N. W. 27; and *Folk v. Milwaukee*, 108 Wis. 359, 84 N. W. 420."

In *Walker v. City of New York*, 107 App. Div. 351, 95 N. Y. Sup. 121, it appears that the City of New York, acting by its common council, issued a permit to certain individuals to give an exhibition of fireworks in a certain portion of the city. An ordinance of the City of New York forbade the discharge of fireworks within that area. During the exhibition Walker was injured. It was contended by the City of New York that there was no liability on the part of the city because the city was acting in its governmental capacity, and that the cause of action alleged against it was its failure to abate a nuisance. The court, however, pointed out the obvious distinction between the liability for failure to abate a nuisance and the liability arising from the creation or maintenance of a nuisance. It said:

"The case of *Leonard v. City of Hornellsville*, 41 App. Div. 106, 58 N. Y. Supp. 266, cited by appellant as an authority supporting its contention, is not in point. The proposition there declared, that a municipal corporation is not liable for a failure to exercise its charter powers in abating a nuisance upon private property so near the street as to menace the safety of persons lawfully using the highway, is not applicable to the facts established in the case at bar, in which the liability of the city is predicated upon the *affirmative action of defendant in licensing and permitting an act made unlawful by its ordinances, carried out under the supervision of its own officers* in such

close proximity to a residence street as to constitute a public nuisance, dangerous to the safety of persons lawfully in the vicinity where the exhibition was given, upon business not connected with such exhibition or as voluntary spectators thereof." (Italics ours.)

In *Hart v. Board of Chosen Freeholders of Union County*, 57 N. J. Law 90, the declaration charged a common nuisance, and the court held that the defendant could not escape, even though the nuisance was an indictable offense. It said:

"We have not been pointed to any precedent extending exemption from liability to cases of *active* wrongdoing, nor are such precedents to be discovered. There is no reason arising out of public policy why municipal corporations should be shielded from liability when a private injury is inflicted by their *wrongful acts*, as distinguished from *mere negligence*. The grounds on which the exemption has been rested in the one class of cases are inapplicable to the other class." (Italics ours.)

In *Hughes v. City of Fond du Lac*, 73 Wis. 381, 41 N. W. 407, the court said:

"A municipal corporation is no more exempt from liability in case it creates a nuisance, either public or private, than an individual."

Continuing, the court refers to the case of *Weet v. Trustees*, 16 N. Y. 161, which quotes the following passage from *Mayor, etc. v. Furze*, 3 Hill 612:

"This case illustrates another distinction which is directly applicable to the case under consideration. The decision therein is not put exclusively upon the ground of the liability of the corporation for a *mere non-feasance*. The

facts of the case show that the corporation *had created a nuisance*. They constructed the sewers, the obstruction of which produced the overflow upon the plaintiff's premises. The injury was produced as much by their *positive act* as by their neglect. Under such circumstances, a corporation, whatever may be its nature, is liable to the same extent and upon the same principles as an individual would be for a similar injury'; and finally the court closes the opinion by saying that 'it follows from the preceding reasoning that, if we regard the injury to the plaintiff as the result of mere neglect to keep the highways of the village in repair, the defendants would be responsible in this action for such neglect, upon the ground that their acceptance of the franchise granted by their charter raised an implied undertaking or contract on their part to perform that duty, which, upon the principles referred to, inures to the benefit of every individual interested in such performance. But it is unnecessary to revert to this doctrine to establish the responsibility of the defendants in this cause, for the reason that the injury to the plaintiff was *not* the result of a *mere non-feasance* on the part of the defendants, but was produced by their construction of the platform in question in such a manner as to constitute it a public nuisance.' " (Italics ours.)

In *Fitzgerald v. Town of Sharon*, 143 Iowa 730, the Supreme Court of Iowa said:

"The creation and maintenance of a nuisance is very clearly not a governmental function, and the authorities are practically of one voice on the subject."

In *Bruhneke v. La Crosse*, 155 Wis. 485, 144 N. W. 1100, the Supreme Court of Wisconsin said:

“When a city creates a nuisance, it is not exercising a governmental function, but is doing something forbidden by law.”

The following authorities lay down the same rule:

Hines v. City of Rocky Mount, 162 N. C. 409;
78 S. E. 510.

Markwardt v. Guthrie, 18 Okla. 32; 90 Pac.
26.

Jacobs v. City of Seattle, 93 Wash. 171, 176;
160 Pac. 299.

Harpers v. City of Milwaukee, 30 Wis. 365,
372.

City of New Albany v. Slider, 52 N. E. 626.

Gordon v. Village of Silver Creek, 127 App.
Div. 888; 112 N. Y. Sup. 54. (Affirmed,
90 N. E. 1159.)

Seifert v. City of Brooklyn, 101 N. Y. 136.

Nashville v. Mason, 137 Tenn. 169; 192 S. W.
915.

Winchell v. City of Waukesha, 110 Wis. 101;
85 N. W. 668.

Clayton v. City of Henderson, 20 Ky. Law
Rep. 87; 44 S. W. 667.

Hines v. City of Nevada, 150 Iowa 620; 130
N. W. 181.

Jones v. Town of North Wilkesboro, 150 N.
C. 646; 64 S. E. 866.

Garrett on Nuisances, 3rd ed. p. 131.

McQuillin on Municipal Corporations, §2641,
p. 5449, and cases cited.

The cases of *Kitsap County Transportation Co. v. Seattle*, 75 Wash. 673; *Foard v. Maryland*, 219 Fed. 827; and *Fowle v. Common Council of Alexandria*, 3 Pet. 398, relied upon by counsel for the City, are not in point. As we have said, the cause of action in this case is not based upon failure to enforce an ordinance, failure to abate a nuisance,

or failure to pass an ordinance or promulgate regulations. The cause of action stated in each of the three cases just cited was a cause of action for negligence; namely, failure to enforce an ordinance or failure to pass an ordinance.

For instance, in the *Kitsap County Transportation Company* case, 75 Wash. 673, the complaint alleged that an ordinance of the City of Seattle made it unlawful to float saw logs, timbers or piles in the harbor of the city in such manner as to obstruct navigation and that there was a duty imposed upon the Port Warden of exercising vigilant control and supervision over the harbor and the enforcement of all ordinances of the city in relation thereto. The propeller of a steamer owned by Kitsap Transportation Company was injured by striking a floating log deposited in the harbor by the Weymouth Construction Company. The Transportation Company brought suit to recover a judgment against the city for the *failure* of the Port Warden to *enforce* the ordinance. That action was, therefore, one for mere negligence. The city in that case did not issue a permit to the Weymouth Construction Company to violate the ordinance. It did not license the Construction Company to float logs in the bay in such manner as to impede navigation, nor did it know the Construction Company intended so to do. If the facts in that case had been, and the complaint had alleged and the proof had shown, that the city directed the Construction Company to float logs in the manner prohibited by the ordinance, then

an entirely different question would have been presented and the city would have been held liable; for, as stated in the Hart case, 57 N. J. Law 90, there is no "precedent extending exemption from liability to cases of active wrongdoing, nor are such precedents to be discovered."

The case of *Foard v. Maryland*, 219 Fed. 827, cited by the City, so far as it is in point, supports our contention. The facts which gave rise to that decision are as follows: Prior to February, 1911, ships which carried dynamite from Baltimore, took it on board at the railroad piers. The great explosion at Communipaw then took place (The Ingrid, 195 Fed. 796, 598). The municipal authorities of Baltimore then became alarmed, and thereupon insisted that the loading of ships with such explosives should thereafter be done at a greater distance from the city. They named the quarantine anchorage as the place. (213 Fed. 79.) On the morning of March 7, 1913, the British Steamer "Alum Chine" lay at anchor in this quarantine anchorage. It had nearly 300 tons of dynamite on board. A score of men were busy storing the dynamite in the forward hold. About 10:30 an explosion, followed by another, occurred. More than thirty people were killed and a large amount of property damaged. (213 Fed. 53.) It was claimed that the explosion was caused by one Bomhard, a foreman of the stevedores, striking a box of dynamite a hard blow with a bail hook. Thereafter, at least three different suits, in all of which the City of Baltimore was made

a party defendant, were brought. They are as follows: *Zywicki v. Jos. R. Foard Co. etc.*, 206 Fed. 975; *State v. General Stevedoring Co.*, 213 Fed. 51, affirmed 219 Fed. 827, *sub nomine Jos. R. Foard Co. v. State of Maryland*; and *Gutowski v. Mayor, etc., of City of Baltimore*, 127 Md. 502, 96 Atl. 630. In each of these cases it was sought to hold the city either upon the theory (1) that the city was negligent in designating the quarantine anchorage as the place for the handling and transfer of dynamite, or (2) upon the theory that the city should have passed an ordinance prohibiting the use of a bale hook in handling dynamite.

The holding in the case of *Zywicki v. Foard Co.*, 206 Fed. 975, is well stated in the case of *Jolivet v. City of Seattle*, 226 Fed. 963. Judge Neterer there said:

“In *Zywicki v. Foard Co.*, 206 Fed. 975, the court simply held the City of Baltimore not liable for an injury to a stevedore occasioned through the negligence of a foreman in storing a cargo of dynamite, because of the *failure of the city to make regulations* for loading of explosives; it having been given authority to make regulations by the State Legislature.” (Italics ours.)

The liability of the city then, in that case, was predicated upon the *failure to pass* an ordinance or to *make regulations* concerning the handling of dynamite. Such is not the case here. We say the City enacted a proper ordinance and then violated it.

The holding in the case of *Jos. R. Foard Co. v.*

State of Maryland, 219 Fed. 827, will be found stated at page 834 of that opinion, as follows:

“Assertion of liability of the city of Baltimore is made on the ground that it was negligent in designating the place where the accident occurred for the transshipment of dynamite, in that it was a place frequented by other vessels, and that it was negligent in not properly supervising the loading of dynamite where an explosion would probably result in loss of life and property. This position is untenable. The general rule is that actionable negligence cannot be imputed to a city for mistake of judgment, or even negligence, of its officers in performing the governmental function of selecting a place for the loading of explosives from which it derives no profit.”

The opinion in the *Jolivet* case would distinguish the case at bar from the *Foard* case by reason of the fact that in the *Foard* case the city derived no profit from furnishing a place for the handling of dynamite, while Judge Neterer held that the City of Seattle in charging one dollar per day for using Buoy No. 1 was a *bailee for hire*. We need not concern ourselves with this distinction now.

The portion of the opinion in the *Foard* case just above quoted shows that the liability in that case was predicated upon the fact that the city had improperly designated a certain place for the handling of dynamite, or that it had failed to pass certain proper regulations to be observed in the handling of dynamite. Again, we say that the cause of action here under discussion is predicated upon the fact that the City did appoint a proper place for

the handling and storage of dynamite, but that instead of requiring the dynamite to be stored at that place it caused or authorized it to be stored elsewhere. The distinction which we are making will be found in the opinion in the case of *Gutowski v. Mayor, etc., of Baltimore*, 127 Md. 502, 96 Atl. 630, 632, where the Supreme Court of Maryland said:

“Upon the principles applied and illustrated in the cases to which we have referred, it would seem to be clear that damages are not recoverable from the municipality by a person injured in consequence of the violation of a municipal ordinance regulating the movement of explosive substances, *unless the city itself caused or sanctioned the particular conditions or acts which produced the injurious results.* This would certainly be the rule in regard to accidents of that character within the corporate limits, and we find no justification in its charter for imposing a greater or stricter liability upon it with respect to similar occurrences on the waterways beyond its borders which the charter has placed under its control. It is not alleged in this case *that the city authorized or occasioned the dangerous practice* mentioned in the declaration, but the averment is simply that it *neglected to enforce its regulations* prohibiting the employment of such methods. This is not a sufficient basis upon which to charge the city with actionable responsibility for the accident.” (Italics ours.)

The case of *Fowle v. Alexandria*, 3 Pet. 398, is also not germane. The point decided in that case is stated in the following headnote:

“The injury alleged in the declaration being an omission to take a bond required by law and

the council not being *enabled* or *required* to take it, the action cannot lie.”

The complaint in that case, therefore, charged a mere act of non-feasance. The complaint in the case at bar charges mis-feasance or mal-feasance.

The City was Acting in Its Proprietary Capacity.

Throughout all the foregoing argument, we have assumed that the City of Seattle was at no time, in relation to the matters here involved, acting in its private proprietary capacity. We have pointed out, for instance, that Judge Neterer distinguished the facts in the *Jolivet* case from the facts in the *Foard* case for the reason that Baltimore derived no profit from maintaining a place for the handling of dynamite, while the City of Seattle did derive such a profit, and was, therefore, a *bailee for hire*. And was not the City of Seattle a *bailee for hire*? Obviously a toll of one dollar per day for the use of a buoy is not a mere license fee. Such a fee is based upon the expense of issuing the license, and in certain cases on the cost to the City of inspection. The expense of issuing the permit here, however, would be the same whether the vessel was moored to a buoy for one day or for a year. The fee is therefore not based in any degree upon the expense of issuing the license. Moreover, it cannot be argued that the charge of one dollar per day was made to cover the cost of inspection, for there is nothing in the ordinance indicating that the fee is exacted for such purpose, or that it was used for such pur-

pose, or that any such amount was necessary to defray the expense of inspection.

Wisconsin Telephone Co. v. Milwaukee, 126 Wis. 1; 1 L. R. A. (N. S.) 581, 587.

Moreover, there is not a particle of proof in this record that the City performed any act of inspection.

Furthermore, the City does not argue that the fee charged was used or designed to be used to defray the cost of regulation, but it contends that it was acting in its governmental capacity because the income derived from these fees was not sufficient to pay the cost of the up-keep and maintenance of the buoys. This is certainly a most novel argument. If a city engages in the street car business, would it be permitted to deny that in engaging in such business it was acting in its proprietary capacity because, forsooth, the income derived from such business did not equal the cost of operation?

It follows, therefore, from what has just been said, that the City in maintaining these buoys and charging toll for their use was acting in its proprietary capacity and consequently the defense of governmental function is not available to it.

No Act of Congress is Herein Involved.

It is asserted in the brief of the City (page 55) that the City could not and did not exercise any control over the dynamite for the reason that it was "in transit in foreign commerce." We con-

fess that we do not understand this contention. The City has, in another portion of its brief, asserted its right to control and regulate the waters in Seattle harbor. In pursuance of that asserted right, it passed an ordinance providing that dynamite should be handled and stored at the powder dock. Now, it may be assumed for the purpose of this case that the City could not prohibit the Steamer "F. S. Loop" from bringing the dynamite into the harbor of Seattle; but it does not follow that the City does not have the right to say where it shall be stored after it has arrived here. No Act of Congress prohibited the City from designating a place at which dynamite shall be handled or stored. The City of Seattle by ordinance did designate a place for the handling and storing of such explosives and then violated its own ordinance.

A mere perusal of Sections 4278, 4279 and 4280 R. S. will disclose that these sections have no bearing on this case. The Act of Congress of March 4, 1909, (35 St. at L. p. 1135) cited in the case of *The Ingrid*, 195 Fed. 596 (affirmed 216 Fed. 72), is also not germane. The last mentioned Act provides that the Interstate Commerce Commission shall formulate regulations for the safe transportation of explosives, which regulations "shall be binding upon all common carriers engaged in interstate or foreign commerce which transport explosives *by land*." (Italics ours.) But Congress did not give to the Commission any power to regulate the water carriers and no court will hold that such power was "*left out in words to*

be *put back by construction.*” Moreover, as we shall subsequently see, the reasons which would induce Congress to give to the Interstate Commerce Commission the power to regulate the transportation of explosives by *land* do not exist with reference to explosives transported by *water*.

Nor does the decision in the case of *The Ingrid* have any bearing on the facts in this case. That was a suit against the Central Railroad Company of New Jersey. The facts in that case are that the Du Pont Powder Company shipped 670 cases of dynamite to a shipper at Communipaw, 300 cases of which, however, had been sold to Carlisle, Crocker & Company, of Montevideo, South America. The car containing this dynamite was placed upon the Railroad Company’s pier on January 26th. On February 1st work commenced in loading the 300 cases on the steam lighter “Katherine W.,” which lighter was then to transport the explosives down the bay and then load them on the steamer “Inveric.” Shortly after the work of loading commenced an explosion took place. Where this explosion took place or the cause of it could not subsequently be determined, as all the men engaged in the operation of loading were killed. The Circuit Court of Appeals apparently thought the most probable cause of the explosion was that 100 barrels of black blasting powder, which had been placed on board the “Katherine W.” prior to the commencement of the loading of the dynamite, had been set off by a spark. (216 Fed. 75.) At any rate, both the trial court and the appellate court held

that there was no proof in the record which would enable them to determine who was responsible for the explosion. Counsel for libelant then sought to charge the Railroad Company with liability under the rule enunciated in *Fletcher v. Rylands*, L. R. 3 H. L. 330, but both courts repudiated that ruling. At this point we may say that we do not and never have relied on the rule announced in that case.

It was argued in *The Ingrid* case, however, that the Railroad Company was liable in that it had failed to comply with the laws of the State of New Jersey and the ordinances of Jersey City in respect to the storage of explosives. The court, however, held that the dynamite was not, under the circumstances of that case, in storage, but that it was in the course of transportation. The facts in the case at bar, however, show that the dynamite was not in transit, but in storage. Moreover, in *The Ingrid* case the court further held that in view of the Act of March 4, 1909, the determination of whether any statute of New Jersey or ordinance of Jersey City applied to the storage or handling of dynamite became immaterial, for the reason that by the passage of the Act, the authority of the local jurisdictions was necessarily excluded. No such question is presented in the case at bar, for, as we have shown, the Act of March 4, 1909, applies only to carriers by land. The reasons which animated Congress in denying to the International Commerce Commission the power to regulate the transportation of explosives by water, clearly appears from these decisions. A carrier by rail is

compelled to transport all dynamite tendered to it for transportation (216 Fed. 78). If Congress, therefore, had not passed the Act of March 4, 1909, "a railway company transporting dynamite over a long railroad system, passing in the trip through various villages, cities and states, would be subject at every stage of the journey to varying local regulations which probably it could not observe." In view of these considerations, it is pre-eminently just that "there should be a central authority, prescribing what the railroad company in the transportation of such explosives, should do." (195 Fed. 602.)

A carrier by water is not compelled to carry dynamite, nor is it subject to a large number of local regulations. There was no reason, therefore, for Congress to provide that a central authority should regulate the transportation of dynamite by water.

Furthermore, in *The Ingrid* case, the trial court found that the place where the dynamite was at the time of the accident was a proper place for its handling. The trial court in this case found that the place where the dynamite was stored was an improper place for its storage, and this being a suit at law, the finding of the trial court is binding upon this court.

Irrespective of Ordinance No. 34379, the City Is Liable.

We have shown, we think, that the City violated Ordinance No. 34379; that in so doing it created a nuisance *per se* for the proximate results of which it is liable in damages. But, even if the City had not passed Ordinance No. 34379, the City would still be liable. The proof shows that Buoy No. 1 was about

twelve or thirteen hundred feet from Harbor Island. (Record, p. 46.) It is asserted in the brief of the City that Harbor Island was unoccupied, but the proof shows that such was not the fact, for the witness Wilman testified that there was a sawmill on Harbor Island. (Record, p. 75.) The testimony also shows that the Centennial Mills and the Albers Mill were about one-half mile from Buoy No. 1 (Record, p. 49) and that the buoy was something over one-half mile from the down-town business section of the City of Seattle. (Record, p. 46.) An examination of the map attached to the bill of exceptions will disclose that the great bulk of the railroad tracks entering the City of Seattle are within a mile of Buoy No. 1.

The lower court in this case held that this dynamite was in storage and not in transit. (Record, p. 84.) Judge Neterer, in distinguishing the facts in the *Jolivet* case from the facts in the case of *The Ingrid*, 195 Fed. 596, had made a like finding. The City throughout its brief has asserted that the dynamite was "in transit in foreign commerce." The finding of Judge Neterer, as well as that of the trial judge in this case, however, is obviously correct. It is true that the Port Warden testified that the dynamite, after its arrival here, was to have been transported to Vladivostok by a Japanese boat; that the Japanese boat for some reason could not take it, and that it was then arranged that the "Robert Dollar" should take it. This testimony was, of course, hearsay; but assuming that it states the fact, it does not show the dynamite was in course of transportation.

The barge containing it had been tied to this buoy for seventeen days. How much longer the dynamite had been in Seattle the evidence does not disclose. Nobody knows when it would have been taken away. The Japanese boat for some reason could not take it; possibly the same reason would operate to prevent the "Robert Dollar" from taking it when the time to take it came. We think, therefore, it cannot be gainsaid that the dynamite was in storage.

Now, Judge Cushman further held that Buoy No. 1 was an improper place to store the dynamite. He said:

"With regard to the purposes of storage, and *I hold that this dynamite was in storage*, I pause for a moment regarding the several witnesses for defense. The answer of one of them impressed me in just the *conclusion that was forcing itself upon me* during the progress of the trial, that is, in the absence of the control of the section of the ordinance regarding the powder dock, this might not have been an unsuitable place to effect a *transfer* of the powder from one vessel to another. Mr. Griffith asked his own witness the leading question, 'Do you not conclude that this was a safe and suitable place for the *storage* of powder and for its transfer?' That is the substance of it. The witness answered, 'I consider it suitable for its *transfer*.' And Mr. Griffith was not satisfied with that answer and he said, 'And also suitable for its *storage*?' The witness *hesitated* and answered 'Yes.' Now, *his first answer was the one that impressed me as most reasonable and satisfactory and really the one that his conscience was back of.*" (Record, p. 84.)

The witness referred to was W. C. Dawson, and his testimony is found on page 80 of the Record.

It is noteworthy that the City uses this faltering, hesitating answer of Mr. Dawson—an answer which the court found was not backed up by Dawson's conscience—to bolster up its assertion that the buoy was a safe place for storing dynamite. (Brief, p. 47.)

Now it needs no citation of authority to show that this finding of the *nisi prius* judge, is binding upon this court. The trial court, then, having found that the dynamite was in storage and that Buoy No. 1 was an improper place to store it, it follows that, *irrespective of the ordinance*, the City, in authorizing the dynamite to be stored at Buoy No. 1, was guilty of maintaining a nuisance.

The liability cast upon the defendants in the following cases is *not* based upon the fact that the defendants therein *violated any statute or ordinance*. The ground of decision in each case is that the defendant therein kept, stored or handled explosives in such a place or in such a manner as to constitute a nuisance.

Heeg v. Licht, 80 N. Y. 579.

Wier's Appeal, 74 Penna. 230.

State ex rel. Hopkins v. Excelsior Powder Mfg. Co., 259 Mo. 254; 169 S. W. 267; L. R. A. 1915 A, 615.

Henderson v. Sullivan, 159 Fed. 46; 16 L. R. A. (N. S.) 691.

Schnitzer v. Excelsior Powder Mfg. Co., 160 S. W. 282.

Melker v. City of New York, 190 N. Y. 481; 83 N. E. 565.

Wilson v. Phoenix Powder Mfg. Co., 40 W. Va. 413; 21 S. E. 1035; 52 Am. St. Rep. 890.

Cheatham v. Shearon, 1 Swan. (Tenn.) 213;
55 Am. Dec. 734.

Viewed from any angle, then, the judgment was right and should be affirmed.

Respectfully submitted,

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Attorneys for Defendant in Error.

In The United States
Circuit Court of Appeals
FOR THE NINTH JUDICIAL CIRCUIT

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
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HON. E. E. CUSHMAN, *Presiding.*

Reply Brief of Plaintiff in Error.

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In The United States Circuit Court of Appeals

For the Ninth Judicial Circuit

No. 3112.

THE CITY OF SEATTLE, a Municipal Corpora-
tion,

Plaintiff in Error,

vs.

LLOYD'S PLATE GLASS INSURANCE COM-
PANY, a Corporation,

Defendant in Error.

APPEAL FROM THE DISTRICT COURT OF
THE UNITED STATES FOR THE WEST-
ERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HON. E. E. CUSHMAN, *Presiding.*

REPLY BRIEF OF PLAINTIFF IN ERROR.

Counsel for defendant in error complain of the statement of the plaintiff in error in its brief, but from a reading of the statement of the case made for defendant in error, the only difference we can see is one of expression. The facts are the same, viz.: that this dynamite that exploded was in foreign commerce, in transit from San Francisco to Vladivostok, via Seattle. The vessel on which it was loaded was under the exclusive management

and control of the Lillico Launch & Towboat Company, agents of the owner of the powder, and was anchored at a buoy set apart for that purpose under the terms of Ordinance No. 34379. That one vessel, without any fault on the part of the City of Seattle, failed to take it. That before the next vessel for Vladisvostok sailed the powder exploded without any fault on the part of the City of Seattle. That the city had nothing to do with the vessel, or its cargo, except its port warden, the executive officer of the harbor department, acting under a discretion vested in him by the city council of the City of Seattle, permitted it to lie at Buoy No. 1.

As to the right of the defendant in error to file a claim against the City of Seattle counsel cite the cases of *Firemen's Fund Ins. Co. v. O.-W. R. R. & Nav. Co.*, 58 Wash. 332, and *Palmer v. O.-W. R. R. & Nav. Co.*, 208 Fed. 666. These cases in *extremis* give no aid or comfort to the defendant in error because the facts are entirely dissimilar. Each of these cases was between individuals. A municipality and its rights were not considered. No claim was necessary to be filed in either one of those cases. In the instant case counsel concedes that a claim is a prerequisite to a right of action. A person reimbursed for injuries by an insurance company still has a right of action against the person causing those injuries under the laws of the State of Washington.

Heath v. Seattle Taxicab Co., 73 Wash. 177, is a case where the plaintiff received compensation from the city in the nature of municipal insurance, and was also permitted to recover from the person causing the injury. At page 186 the court said:

“It is in its essence, municipal insurance for which a consideration is paid. We can see no difference in principle between this and ordinary accident insurance, so far as the question here involved is concerned. The fact that a person injured by another’s negligence, having accident insurance for which he has paid, is reimbursed by the insurance company for his loss of time and expenses caused by the injury, cannot preclude him from maintaining an action for these same items against the person causing the injury. It would be contrary to public policy, and shocking to the sense of justice, to hold that the proceeds of insurance paid for by the injured person for his own benefit or that of his widow and children should insure to the benefit of, and grant immunity to, the person whose negligence, wilful or otherwise, injured him or caused his death. 2 *Shearman & Redfield*, *Negligence* (5th ed.), § 765; *Harding v. Town of Townshend*, 43 Vt. 536, 5 Am. Rep. 304; *Coulter v. Pine Township*, 164 Pa. St. 543, 30 Atl. 490; *Sherlock v. Alling*, 44 Ind. 184; *Althorff v. Wolfe*, 22 N. Y. 355.”

In *Engstrom v. City of Seattle*, 92 Wash. 568, this principle was applied as against the municipality:

“We think the *Heath* case is in point, and that the trial court should have followed the rule there announced. * * * The fact that he collected damages from the persons injuring him while he was in the employment of the city and in the line of his duty, did not relieve the city from complying with its contract of employment with Mr. Engstrom.”

We then have this situation. The person suffering the damage to his property is not only entitled to recover from the insurance company on his contract of insurance but would be entitled to recover against the party whose negligence caused the injury. If there was any right in the insurance company to recoup the money it paid on its contract of insurance, it was perhaps subrogated to that right. But it was not subrogated to the right to claim damages suffered by the insured and it could not have that right unless the same was assigned to it. In other words, the persons whose glass was broken had a right to commence an action against the City of Seattle for damages. They had a right to recover from the insurance company on their contract of insurance. The first was in tort; the second on contract and nowhere has the insurance company acquired the right to file a claim or commence an action for the tort. This still remains in the individual whose glass

was broken. Therefore, he must prepare, swear to and file a claim. The person whose property was damaged not having filed a claim, and not having assigned his right to file a claim (if it could be assigned), or his right to sue in tort, there is, therefore, no proper claim filed and the action cannot be maintained. In a suit brought by the person who claimed to have suffered damage to his property evidence as to his being insured could not be introduced.

In *Shay v. Horr*, 78 Wash. 667, at page 669, the court says:

"It is evident that, notwithstanding the rulings of the court, counsel for respondent and his witnesses intended the jury should fully realize that appellant was protected by some form of insurance. That their efforts to do so constitute prejudice and reversible error, cannot be denied under the previous rulings of this court. *Iverson v. McDonnell*, 36 Wash. 73, 78 Pac. 202; *Lowsit v. Seattle Lumber Co.*, 38 Wash. 290, 80 Pac. 431; *Stratton v. Nichols Lumber Co.*, 39 Wash. 323, 81 Pac. 831, 109 Am. St. 881; *Westby v. Washington Brick, Lime & Mfg. Co.*, 40 Wash. 289, 82 Pac. 271; *Birch v. Abercrombie*, 74 Wash. 486, 133 Pac. 1020, 135 Pac. 821. We have held in these cases that it is improper to either directly or indirectly get before the jury any fact which conveys information that the defendant is insured against loss in case of a recovery."

This clearly shows that the tort and insurance contract do not merge but remain separate and a claim must be filed for the tort. Before the defendant in error could sue for the tort it must possess itself of that right. This it has not done. The right to sue for the tort cannot be in two persons at the same time.

We have no quarrel with the principle that where a person violates an ordinance, the result of which is injury to a third person, that the person violating the ordinance is liable in damages. Many cases cited by defendant in error illustrate this principle. But we seriously dispute the proposition that a municipality is liable for the acts of an executive officer of a department, charged with the regulation and control of ships and their cargoes and in whom a discretion has been vested by the law-making department of the municipality, in the exercise of that control and regulation. This distinction is clearly made in *Boulton v. Crowther*, 2 Barn. & Cress. 703, where Littledale, Judge, states the rule:

“* * * Where an act of parliament vests a power in trustees or commissioners, to be exercised by them not for their own benefit, but for that of the public, and gives no compensation for a damage resulting from an act done by them in the execution of the power, the legislature must be taken to have intended that an individual should not receive any compensation for the loss resulting to him from

an act so done for the public benefit.”

In *Tinsman v. The Belvidere Delaware R. R. Co.*, 26 N. J. L. Rep. 148, at page 163, the court, speaking through the Chief Justice, says:

“Speaking of the principle, already averted to, that a public agent, in the execution of a public trust for the public benefit, while acting judiciously within the scope of his authority is not liable for damages, Chief Justice Gibbs said the case is perfectly unlike that of an individual who, for his own benefit, makes an improvement on his own land. The resemblance fails in the most important point of comparison: the work is not done for a public purpose, but for private emolument. *Sutton v. Clark*, 6 Taunt. 29.”

The court then adopts the rule as announced in *Boulton v. Crowther*.

In *Radcliffe v. The Mayor of Brooklyn*, 4 Comst. R. 200, Mr. Justice Bronson stated the principle:

“An act done under lawful authority, if done in a proper manner, can never subject the party to an action, whatever consequences may follow.”

The *Tinsman* case was cited with approval in *McAndrews v. Collerd*, 42 N. J. L. Rep. 189, a case cited by defendant in error.

The case of *Kolb v. Mayor of Knoxville*, 111 Tenn. 311, 76 S. W. 823, cited by defendant in error, affirms the principle that the city is not

liable for the character of the vessel on which the powder was loaded, it not being in the employ of the city nor under its control. The court said:

“The seventh assignment is based upon the following portion of the judge’s charge: ‘If you shall be of the opinion that such odors, smells, and other things detrimental to the health of the plaintiff were caused by the unsanitary condition of wagons used by other parties who were not in the employ of the city, and with whom the city had no connection, why, then, there could be no recovery in this case on that account, and it would be your duty to so find.’ The basis of fact on which this portion of the judge’s charge rests was that the city had authorized one Showalters and another, who were private persons, and in the employ of various people about the city, to dump refuse into the manhole above referred to. In other words, these people were not in the employ of the city at all, but were simply given permission to dump the refuse into the manhole. As a condition of granting the license or continuing it, the city required that wagons of a certain description, that is, with closed tops or barrels with screw tops, should be used. Under these circumstances the city would not be liable for the condition in which the wagons were kept by Showalters and his companion.”

Fitzgerald v. Town of Sharon, 143 Iowa 730,

121 N. W. 523, cited by defendant in error, is a trespass case and so all of the cases cited by defendant in error are distinguishable from the facts in the instant case.

From the opinion of the court, Record p. 84, in speaking of the testimony of W. C. Dawson, the court said the question was asked that Buoy No. 1 was a suitable place for storage. The actual question asked was as follows:

“Q. What would you say as to the safety of Buoy No. 1 for the transferring of explosives such as are in issue here and as to the anchorage of boats or vessels carrying that explosive at that buoy?

“A. I consider it a very proper and safe place for the exchange of explosives from one vessel to another.

“Q. And to anchor boats?

“A. Yes, sir.”

The question of storage never was mentioned. The question of transfer and anchorage were both mentioned and the witness testified that it was a safe place for both purposes. That the court should place upon this testimony a construction not warranted does not change the fact that the witness testified that it was a safe place to anchor boats carrying explosives. While the court said he considered this dynamite was in storage no such condition existed as would cause the law to determine that it was in storage. And where a finding of the court was in conflict with the law it cannot stand.

This dynamite was in transit; it had only traveled a portion of its journey. Webster defines "in transit" as follows:

"A passage through. 'In France you are now. . . in the transit from one form of government to another.' *Burke*. Act or process of causing to pass; as the transit of goods through a country or from a vendor to a purchaser. Goods shipped from one person to another are said to be *in transit* from the time when delivered to the carrier by the consignor to that when actually or constructively delivered to the consignee."

Webster defines storage:

"Act of storing. State of being stored; the safe keeping of goods in a warehouse or other depository."

Thus it can be clearly seen that this powder cannot be in storage and in transit at one and the same time. That it was awaiting a vessel to complete its journey *does not make it in storage*. From counsel's argument it would have been just as unlawful to have stored this powder at the Harrison Street dock as it would have been to store it anywhere else, because nowhere in Section 39, the section which he contends required this dynamite to be stored at the Harrison Street dock, is the word "storage" used, nor is storage permitted there. The language of that section is:

"The Harrison Street municipal pier is hereby designated for use temporarily as a

powder dock and for the use exclusively for the *handling* of powder, dynamite and other like explosives and as a place for vessels carrying as cargo, or part cargo, such explosives."

If the dynamite on this vessel which was anchored at Buoy No. 1 was in storage, then if the vessel were lying at the powder dock it would likewise be in storage, and storage is not permitted at the Harrison Street pier.

The logical conclusion from the construction of the ordinance as contended for by defendant in error, would be to deny the right of vessels carrying dynamite or powder in inter-state or foreign commerce to be or lie in Seattle harbor; no place where powder could be kept pending the continuance of its transportation foreign. Such a construction is absurd and we cannot believe that counsel really thinks such a construction should be given to this ordinance. This belief is augmented by his position in the lower court where in argument he said:

"I quite agree that if Lillico, without having been directed so to do, had taken that dynamite down to buoy No. 1 and it had exploded, that we could not maintain a suit against the City of Seattle because it had failed to enforce the ordinances which would have required the storage of that powder at the Harrison Street dock. I agree to that proposition. We have never asserted anything to the contrary, but we say that that is not this case." (Record, p. 82.)

What counsel here agrees to is what actually happened. Lillico & Company took this powder and dynamite and tied it up at this buoy without the knowledge of the port warden (Record, p. 44) and the port warden simply permitted the dynamite to remain at that buoy until a vessel arrived to carry it to its destination.

We respectfully submit that the judgment should be reversed and the action dismissed.

Respectfully submitted,
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United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

CITY OF SEATTLE, a municipal corporation,
Plaintiff in Error,

vs.

LLOYDS PLATE GLASS INSURANCE COM-
PANY, a corporation,
Defendant in Error.

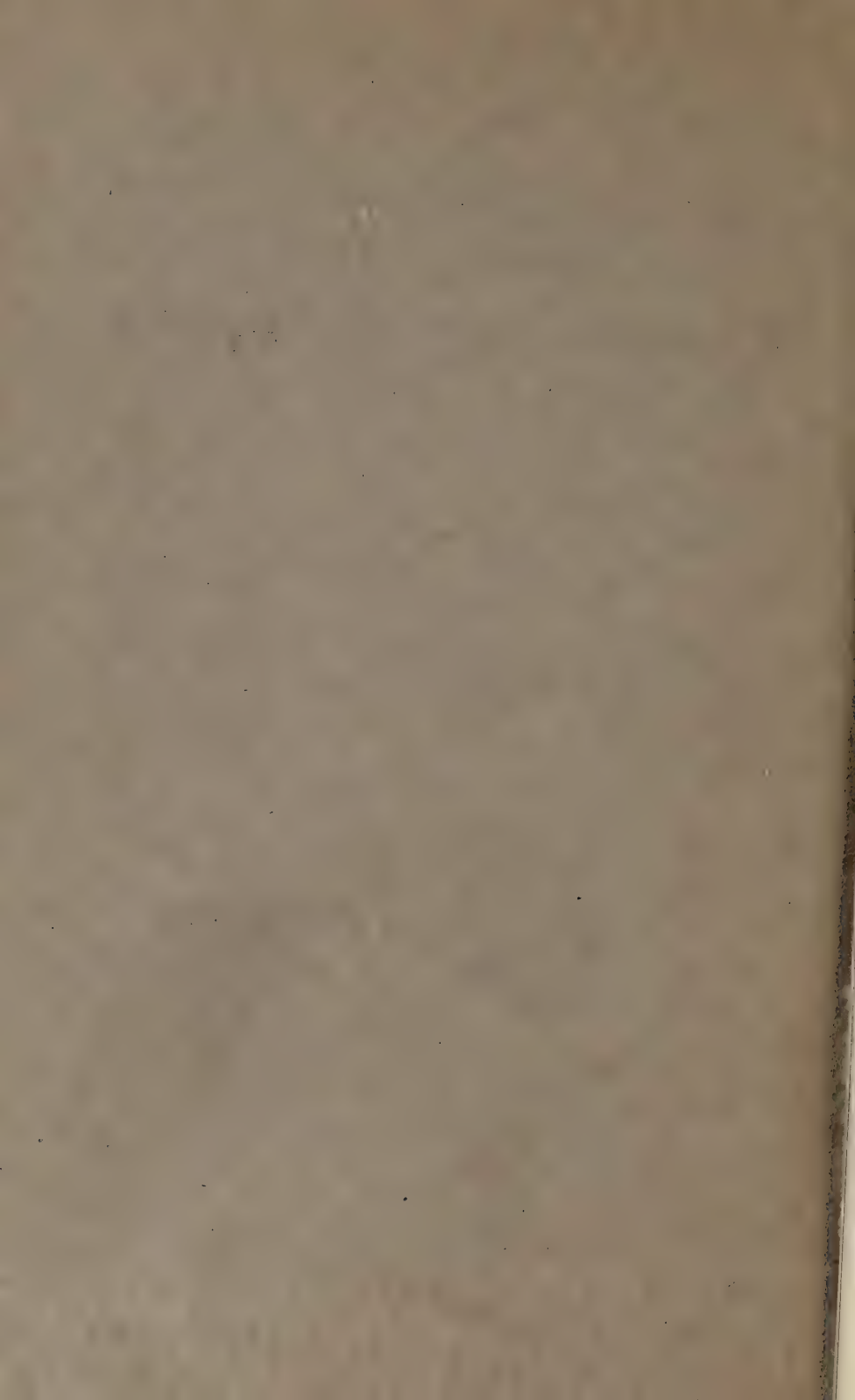
UPON WRIT OF ERROR TO THE DISTRICT
COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF WASH-
INGTON, NORTHERN DIVISION.

Petition for Re-Hearing

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United States Circuit Court of Appeals

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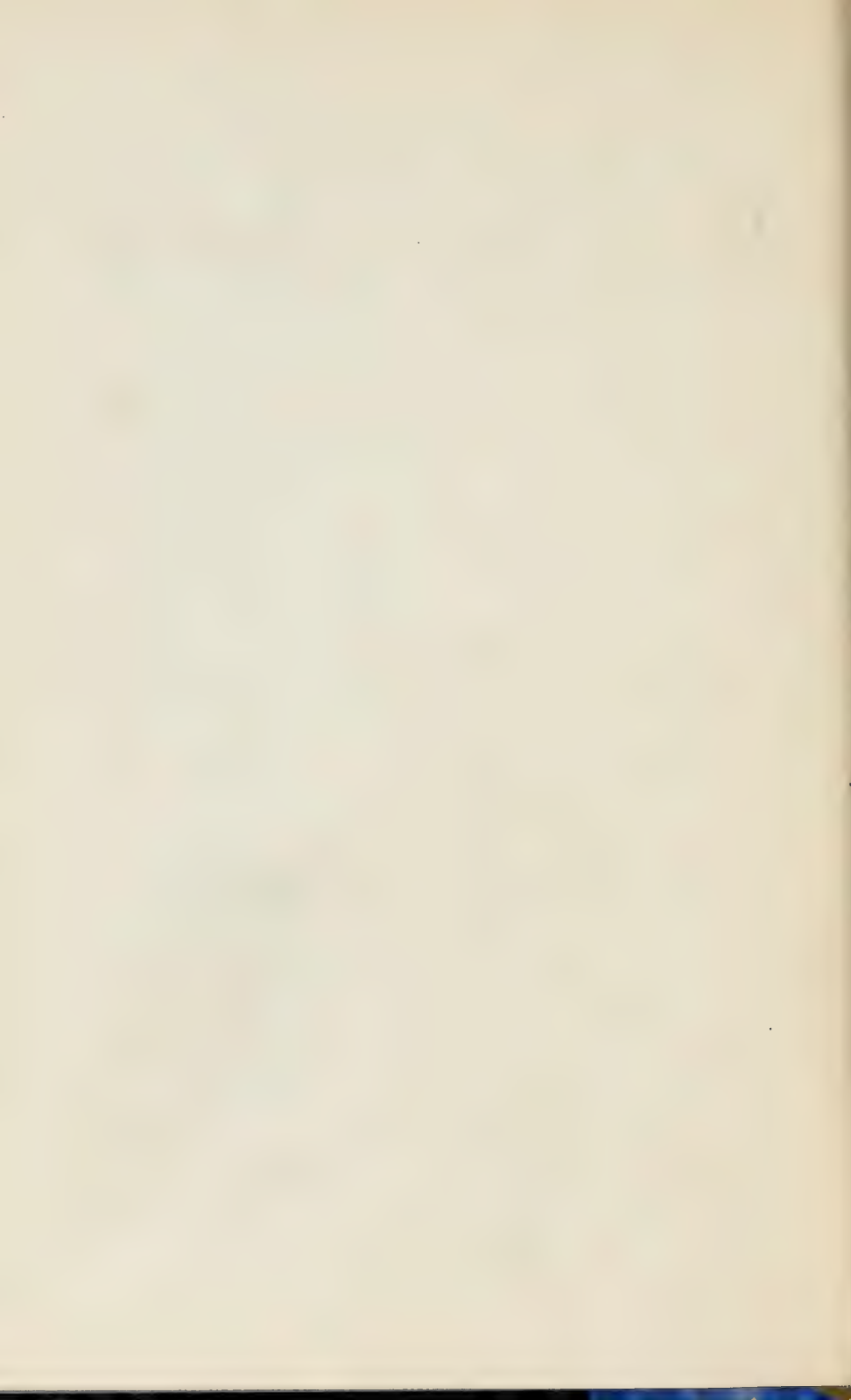
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United States Circuit Court of Appeals

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UPON WRIT OF ERROR TO THE DISTRICT
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INGTON, NORTHERN DIVISION.

Petition for Re-Hearing

The plaintiff in error, the City of Seattle, respectfully petitions this court to grant a rehearing in this case upon the following grounds:

That from the opinion it does not appear that the court considered the principle of law which, in our opinion, is controlling in this case, namely:

“Unless there be a valid contract creating, or a statute declaring, the liability, a municipal corporation is not bound to secure a perfect execution of its by-laws, relating to its public powers, and it is not responsible civilly for neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.” This principle has been adopted by the Supreme Court of the State of Washington as the law of that state: First in the *Kitsap County Transportation Co. vs. Seattle*, 75 Wash. Reports, 673, and also in the very recent case of *Fluckiger vs. Seattle*, decided August 7, 1918, and reported in Vol. 3, No. 6, Wash. Decisions, at page 235. See also 4 *Dill. Mun. Cor.* (5th Ed.), Sec. 1627, where the rule is announced; also *Wheeler vs. City of Plymouth*, 18 N. E. 532; *Hines vs. City of Charlotte*, 40 N. W. 333. In *Faulkner vs. City of Aurora*, 44 Am. Reports, 1, it is said:

“Without seriously complaining of the appellee for having failed to pass a proper ordinance for the prevention of coasting, the appellant seems to rest his right to recover upon its failure to execute the ordinance which it had adopted. Was the appellee liable for such failure? Any one of the appellee’s citizens might, under the ordinance, have instituted proceed-

ings against persons coasting on the streets in violation of its provisions. Grant, however, that it was peculiarly the duty of the officers of the appellee to enforce the ordinance and prosecute all persons violating the same, the appellee would not be liable for their failure to discharge this duty. Dillon says, section 754:

“ ‘Unless there be a valid contract creating, or a statute declaring the liability, a municipal corporation is not bound to provide for and secure a perfect execution of its by-laws, and it is not responsible in a civil action for the neglect of duty on the part of its officers in respect to their enforcement, although such neglect results in injuries to private persons which would otherwise not have happened.’

“* * * If the appellee is liable for the injury thus produced, it would follow, logically, that it would be liable for an injury caused by loafers lounging upon its streets, occurring in the presence of its officers, if it were known that such persons were accustomed to lounge and loaf upon its streets. *To hold incorporated cities liable for such injuries would be unjust, and we think without the sanction of law.*”

In *Schultz vs. City of Milwaukee*, 49 Wis. 254, 35 Am. Rep. 779, it is said:

“The coasting or sluicing down Poplar Street in the manner and to the extent charged in the complaint was, while being indulged in, a grievous public nuisance, which the city authorities ought to have prevented or suppressed. But this duty is a public or police rather than a corporate duty in the performance of which

the corporation, as such, has no particular interest, and from which it derives no special benefit or advantage in its corporate capacity, but which it is bound to see performed in pursuance of a duty imposed by law for the general welfare of the inhabitants or of the community."

In *Norristown vs. Fitzpatrick*, 39 Am. Rep. 771, it is said:

"It is thus apparent from authority, that for the neglect of the police officer, who stood by and permitted the firing of the gun to go on, the borough of Norristown cannot be made liable."

Under the charter provisions and the ordinance regulating the water traffic in Elliott Bay, *the Port Warden is but a police officer*. He is charged as such with the duty of enforcing an ordinance which imposes a penalty upon any one violating its provisions. He fails to enforce the ordinance. Under the authorities above cited and quoted from, for that failure, the municipality cannot be made liable.

Second: The ordinance regulating vessels carrying as cargo or part cargo explosives in any form does not prohibit such vessels from mooring to buoys established by the city and placed in anchorage grounds defined by the city. In the opinion in

Gutowski vs. Mayor, etc., of Baltimore, it is said:

this case it is said by the court, "in the case of

The same obvious distinction was pointed out by the Supreme Court of Maryland, between such cases of negligence or failure on the part of the municipality, and such a case as is here complained of where the complaint in the case as well as the decision of the court below are based upon the ground that the defendant city, in authorizing and directing, through its Port Warden, this dynamite to be placed and kept at its Buoy No. 1, created a public nuisance in violation of its own ordinance designating another and different place for such purpose."

The provisions of the ordinance permitting vessels carrying power to anchor in the bay and away from the Harrison Street pier are as follows:

"Every vessel lying at any powder dock or at anchor within Seattle harbor, which has a cargo, or part cargo, of dynamite, ignition caps, blasting or sporting powder, or other high explosive or explosives, in any form, shall, between sunset and sunrise display * * * a red flag. * * * " (Record, page 55.)

"Every vessel carrying a cargo of explosives in any form, while lying at anchor or at a *city buoy*, or alongside the powder dock, shall at all times, both by day and night, have on board a competent and sufficient crew." (Record, page 57.)

These provisions expressly authorize the anchorage of vessels, having on board explosive in any form, in the harbor or to tie up at a buoy. A scow is defined as a vessel by section 2 of the ordinance. (Record, page 50.)

Section 39 does not either imply intention to, or in language change or modify the rights given vessels by the preceding excerpts of Section 38, but clearly recognize the rights afforded by that section. Section 39 provides:

“The Harrison Street municipal pier is hereby designated for use temporarily as a powder dock, and for use exclusively for the handling of powder, dynamite and other like explosives, *and as a place* for vessels carrying as cargo, or part cargo, such explosives.”

This section does not say that this dock is the only place at which vessels carrying explosives can lie, but simply designates it as a place, carrying the construction placed upon this section by the court in its opinion to its logical conclusion it would in effect repeal all other provisions of the ordinance. It would prohibit the transfer of the explosives from vessel to vessel, a right expressly granted by the ordinance or in any other way handling explosives except at that pier. The impracticability of this was

seen by the legislative body of the city and provision was made in the ordinance for the anchorage of boats carrying powder, not only in the waters of Elliott Bay, but at the buoys established in aid of commerce. The legislative body also took into consideration the patent danger to life and property that would be occasioned by storing large quantities of high explosives on the Harrison Street pier, and therefore denied the right to *store* explosives at said pier, granting only the right to *handle* explosives there. They recognized that it would be necessary to have dynamite on powder boats away from the Harrison Street pier and they provided for such safety by permitting such explosives to be stored on such powder boats within Seattle harbor. Paragraph 4 of Section 38 provides:

“No person shall on any pier, or other structure except on the powder dock or *on powder boats, within Seattle Harbor*, store * * *.”

The legislative body's farsightedness denied the right to *store* powder at the Harrison Street pier, but expressly permitted the storage of dynamite on powder boats within Seattle Harbor. A scow as well as any other kind of boat can be a powder boat. A powder boat is one carrying or loaded with powder.

The construction, in our opinion, placed upon Section 39 of the ordinance would repeal the right to store dynamite on powder boats, a right expressly granted, and at a place other than the Harrison Street pier. We are forced to the conclusion that the rights intended to be given by the terms of the ordinance do not justify the holding of this court that "in authorizing and directing, through its port warden, this dynamite to be placed and kept at Buoy No. 1, created a public nuisance in violation of its own ordinance designating another and different place for such purpose." The city having a right to fix the place or places in Seattle Harbor for the anchorage or mooring of boats carrying dynamite, and having exercised that right by designating several places, cannot be held to have established a nuisance by permitting this dynamite to be anchored at one of those places. The statutes of the State of Washington define what is a public nuisance and what is a private nuisance. Section 8308 of Remington's 1915 Code defines eight things and declares each of them a public nuisance:

"SEC. 8308. PUBLIC NUISANCES ENUMERATED.—It is a public nuisance:

1. To cause or suffer the carcass of any animal or any offal, filth or noisome substance to

be collected, deposited or to remain in any place to the prejudice of others;

2. To throw or deposit any offal or other offensive matter, or the carcass of any dead animal, in any watercourse, stream, lake, pond, spring, well, or common sewer, street or public highway, or in any manner to corrupt or render unwholesome or impure the water of any such spring, stream, pond, lake or well, to the injury or prejudice of others;

3. To obstruct or impede, without legal authority, the passage of any river, harbor, or collection of water;

4. To obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing places, and ways to burying places;

5. To carry on the business of manufacturing gun-powder, nitro-glycerine or other highly explosive substance, or mixing or grinding the materials therefor, in any building within fifty rods of any valuable building, erected at the time such business may be commenced;

6. To establish powder magazines near incorporated cities or towns, at a point different from that appointed by the corporate authorities of such city or town; or within fifty rods of any occupied dwelling-house;

7. To erect, continue, or use any building, or other place, for the exercise of any trade, employment or manufacture, which, by occasioning obnoxious exhalations, offensive smells or otherwise is offensive or dangerous to the health of individuals or of the public;

8. To suffer or maintain on one's own premises, or upon the premises of another, or to permit to be maintained on one's own premises, any place where wines, spirituous, fermented, malt or other intoxicating liquors are kept for sale or disposal to the public in contravention of law."

None of these defines the anchorage of boats carrying explosives to a buoy as a nuisance.

Section 8309, Remington's 1915 Code, defines "nuisance": "Nuisance, consists in *unlawfully* doing an act or omitting to perform a duty which act or omission either annoys, injures, or endangers the comfort, repose, health or safety of others."

Section 8311 of Remington's 1915 Code provides: "Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance." Now, when it is made lawful by the ordinance for the port warden to permit dynamite to be stored on powder boats within Seattle Harbor, under the express enactment of the legislature of Washington, such act cannot be a nuisance. When it permits vessels carrying as cargo or part cargo, explosives in any form to lie at anchor in Seattle Harbor, or at a buoy, and such permission is granted to a vessel, it is under the express authority of the ordinance and cannot be a nuisance. On page nine of the typewritten opinion in this case the court said:

“We are of the opinion that there is not only nothing in it (the ordinance) authorizing the Port Warden to permit any vessel engaged in transferring dynamite from one vessel to another in the harbor to tie up with it on board to Buoy No. 1.”

There is a section of the ordinance which expressly provides for the transfer of dynamite. It is the first paragraph of Section 38, as follows:

“Every vessel engaged in the transfer of any explosive from one vessel to another within Seattle Harbor, shall come to an absolute stop before beginning such transfer and shall not move its propelling machinery, etc. * * *”

But this has nothing to do with the right granted by the ordinance to moor vessels to buoys or anchor them in the harbor, and if the construction placed on Section 39 by the court is the correct one, explosives could not be transferred from one vessel to another except at the powder dock and would work a repeal of the right to transfer in the open harbor.

Further, anything that is prohibited cannot be regulated; there is nothing to regulate. Hence if the mooring of vessels carrying explosives is prohibited in Seattle Harbor except at the Harrison Street pier, there could be no regulation of such

vessels at any other place. Yet we find that the ordinance, in issue, in terms regulates the anchorage of such vessels and their cargo at buoys and other places in the harbor in the greatest and most explicit detail.

It seems to us after careful and mature consideration, that the opinion of the court places a construction and gives force and power to the language of Section 39 of the ordinance never intended to be given it by the legislative body and one which works a practical repeal of all the other mentioned provisions of said ordinance.

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We hereby certify that the within petition for rehearing is in our judgment well founded and that it is not interposed for delay.

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